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Supreme Court, U.S.
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No. 89-217

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Raphael Gregorian
and California International Trade
Corporation,

Petitioners

v.

Izvestia, Ministry of Foreign Trade of
the Union of Soviet Socialist Republics,
Union of Soviet Socialist Republics,
V/O Medexport, and
V/O Licensintorg,

Respondents.

**Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

Appendix, Vol. 2

Gerald L. Kroll
Kroll & Firestone
Attorneys for Petitioners
1801 Century Park East,
Suite 1500
Los Angeles,
California 90067
(213) 557-1756

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAPHAEL GREGORIAN; CALIFORNIA INTERNATIONAL TRADE CORPORATION,

Plaintiffs-Appellees,

v.

IZVESTIA; MINISTRY OF FOREIGN TRADE OF THE UNION OF SOVIET SOCIALIST REPUBLICS; V/O LICENSINTORG,

Defendants,

and

V/O MEDEXPORT,

Defendant-Appellant.

RAPHAEL GREGORIAN and CALIFORNIA INTERNATIONAL TRADE CORPORATION,

Plaintiffs-Appellants,

v.

IZVESTIA; MINISTRY OF FOREIGN TRADE OF THE UNION OF SOVIET SOLIALIST REPUBLICS; V/O MEDEXPORT,

Defendants-Appellees,

and

UNION OF SOVIET SOCIALIST REPUBLICS; V/O LICENSINTORG,

Defendants.

Nos. 87-5903; 88-5562

D.C. No. CV-85-0100-KN

OPINION

Appeal from the United States District Court
for the Central District of California
David C. Kenyon, District Judge, Presiding

Argued and Submitted
October 6, 1988—San Francisco, California

Filed April 12, 1989

Before: Harry Pregerson, Stephen Reinhardt and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Courts and Procedure/Jurisdiction

The court affirmed in part, and reversed and remanded in part the district court's order setting aside a libel default judgment while denying setting aside the contract default judgment. The court held that the libel claims were not properly before the court but that the motion to set aside default judgment on the contract claims should have been granted because defendant's failure to respond was not culpable.

Raphael Gregorian and California International Trade Corporation [CIT] filed a complaint against *Izvestia*, the Ministry of Foreign Trade of the Union of Soviet Socialist Republics, Union of Soviet Socialist Republics, V/O Licensintorg, and V/O Medexport alleging they caused to be published false and libelous accusations against Gregorian, intending to injure him and his business reputation, and to discredit CIT. Plaintiffs allege defendants engaged in this activity to avoid contractual obligations to plaintiffs. The district court granted defendants' motion to set aside the default judgment

previously entered on the libel claim, holding that its previous judgment was void for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, [FSIA] 28 U.S.C. §§ 1600 et seq. [1976], and accordingly dismissed the libel claim. However, the district court declined to set aside the default judgment on the breach of contract claims because the "direct effect" clause of the FSIA's section 1605[a][2] provided subject matter jurisdiction over the contract claims.

[1] Initially, the court determined that the district court did not abuse its discretion when it assessed the equities of the Rule 54[b] certification and the appeal of the dismissal of the libel claim was properly before the court. **[2]** After analysis of the libel claims and applying FSIA principles, the court agreed with the district court and held that the activity that brought about the publication of the allegedly libelous article in *Izvestia* was governmental rather than commercial in nature for purposes of section 1605[a][2] of the FSIA. **[3]** However, the court disagreed with the district court's finding that for the purposes of the Rule 60[b] motion to set aside the default judgment on the contract claims that defendant's conduct appeared to be culpable. **[4]** Instead, the court held that where a foreign sovereign defendant's reasonable belief that it was immune from suit led it to refuse to appear in an action brought under the FSIA, the court may not characterize this refusal as culpable conduct for Rule 60[b] purposes in setting aside a default judgment and reversed the denial of the Rule 60[b] motion. **[5]** On remand, the court directed the district to address the issues of personal and subject matter jurisdiction under the FSIA and provided its own extensive guidance in this area.

COUNSEL

John Mage, Wolf, Popper, Ross & Wolf & Jones, New York, New York, for the defendant-appellant/cross-appellee.

Gerald L. Kroll, Kroll & Firestone, Los Angeles, California, for the plaintiff-appellee/cross-appellant.

Douglas Letter, Department of Justice, Washington, D.C., for the amicus United States.

OPINION

PREGERSON, Circuit Judge:

The two appeals in this case stem from a suit brought by plaintiffs Raphael Gregorian and his firm, California International Trade Corporation (CIT), against defendants U.S.S.R., the Soviet newspaper *Izvestia*, two Soviet foreign trading organizations, V/O Medexport and V/O Licensintorg, and the Ministry of Foreign Trade of the U.S.S.R.[1] In their complaint plaintiffs alleged that defendants had damaged plaintiffs' reputations and harmed them financially by causing CIT's "accreditation" by the Ministry of Foreign Trade to be revoked and by causing to be published an article in *Izvestia* that libeled plaintiffs. Plaintiffs alleged that defendants engaged in this conduct to avoid contractual obligations to plaintiffs resulting from alleged promises to pay for medical equipment transported to the Soviet Union by plaintiffs. Plaintiffs also alleged that defendants had breached these contractual obligations by failing to pay for this equipment. When, following instructions from their government, defendants did not appear, default judgments on both the libel and contract claims were entered against them. After plaintiffs attempted to execute on their judgment by levying on defendants' property, V/O Medexport and V/O Licensintorg appeared and requested that the default judgments be set

[1]Plaintiffs originally brought suit against four American defendants—Mine Safety Appliance Company; Catalyst Research; J. Wesley Kulp; and Alan A. Schneider, Ph.D.—in addition to the Soviet defendants. The American defendants are not parties to these appeals.

aside. The district court set aside the default judgment on the libel claim, but denied the motion to set aside the default judgment on the contract claims. *Gregorian v. Izvestia*, 658 F. Supp. 1224 (C.D. Cal. 1987).

Plaintiffs have appealed the court's order setting aside the libel default judgment; defendant V/O Medexport has appealed the denial of its motion to set aside the contract default judgment.

These two appeals present the following questions. First, was the district court's Rule 54(b) certification of its order dismissing plaintiffs' libel claim proper? Second, did the district court correctly conclude that the Foreign Sovereign Immunities Act, 28 U.S.C. sections 1600 *et seq.* (1976), did not confer jurisdiction over plaintiffs' libel claim? Third, did the district court err in denying defendants' motions to vacate the default judgment on plaintiffs' contract claims?

BACKGROUND

Beginning in 1970, Raphael Gregorian, a United States citizen, and his firm, California International Trade Corporation (CIT), engaged in the business of exporting medical and laboratory goods to the U.S.S.R. In 1982, the Soviet Ministry of Foreign Trade awarded "accreditation" to CIT. This enabled CIT to employ Soviet personnel and to maintain an office in Moscow with telephone and telex equipment. The accreditation evidently provided CIT significant business advantages, including increased credibility with United States manufacturers of medical and laboratory equipment.

Plaintiffs allege that they arranged to sell three sets of equipment to the Soviets: the "Technicon" equipment, in 1982; the "Mennen" equipment, in 1984; and the "Sarns" equipment, in 1984. Plaintiffs allege that CIT shipped all the items to the Soviet Union at or about the time of their alleged purchase by the Soviets, and that the equipment was in use in

Soviet hospitals in 1984. According to plaintiffs, defendants Ministry of Foreign Trade, the U.S.S.R., and V/O Medexport and V/O Licensintorg (Soviet foreign trading organizations) were CIT's "customers," i.e., they had entered into oral contracts with CIT regarding the above-mentioned equipment. Plaintiffs allege that defendants have never paid for any of this equipment, in violation of their contractual commitments. Defendants disclaim any such contractual arrangements.

On November 10, 1984, the Ministry of Foreign Trade stripped CIT of its accreditation to maintain a business office in the U.S.S.R. On November 18, 1984, the Soviet newspaper *Izvestia* printed an article[2] entitled "Duplicitious Negotiator: A Story About a U.S. Firm and an Abuse of Trust." The article accused Gregorian of engaging in smuggling, bribery, and unethical business practices; it also intimated that he had been spying for the United States. 658 F. Supp. at 1226. According to plaintiffs, this article demolished the business reputation of CIT, causing it to lose valuable business contacts and reducing it to "a narrow, windowless basement office in Mr. Gregorian's home." Opening Brief on Behalf of Appellants, at 5.

Plaintiffs brought suit against the Soviet defendants in United States District Court in January of 1985, alleging, *inter alia*, breach of contract, libel, and civil conspiracy. Plaintiffs basically alleged that the Soviet defendants had stripped CIT of its accreditation and published the article in *Izvestia* to avoid their contractual obligations to pay for the equipment which CIT had shipped to the U.S.S.R.

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[2]Defendants do not concede the accuracy of plaintiffs' translation of this article. Defendants, however, have not provided an alternative translation; they state that because plaintiffs' translation "was the basis for the district court's rulings it [is] . . . taken as if it were accurate for the purposes of this appeal." Answering Brief of Cross-Appellees V/O Medexport and V/O Licensintorg, at 42 n.21.

Service of process was made on the Soviet defendants through the United States Department of State pursuant to 28 U.S.C. section 1608(a). On May 31, 1985, the United States Embassy in Moscow transmitted the summons and complaint and enclosed copies of each to the Soviet defendants with a note advising them of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1600 *et seq.* The note also informed defendants that under United States law a defendant must file an answer to the complaint within sixty days or risk default.

At the direction of their government, the defendants rejected service and the district court entered their default on July 31, 1985. The court then ordered entry of default judgment on four of the contract claims and the one libel claim, eventually awarding damages of $163,165 on the contract claims and $250,000 on the libel claim.

After plaintiffs obtained an order giving them the right to attach and execute against defendants' property in the United States, they seized a Cyrillic typewriter belonging to a U.S. correspondent for *Izvestia*. Soon afterwards they obtained another order permitting them to execute against funds held under the name of the Bank for Foreign Trade, U.S.S.R., "for the benefit of V/O Medexport." One day later, on November 21, 1986, American counsel filed a notice of entry of appearance on behalf of V/O Medexport and V/O Licensintorg. V/O Medexport and V/O Licensintorg filed motions to set aside the default judgments, stay execution, and dismiss the case.

The appearance of the two Soviet defendants followed lengthy negotiations with the U.S. State Department, which urged the Soviets to appear. The United States as *amicus curiae* then supported defendants' motion to set aside the default judgments so that the Soviets' defenses could be considered on the merits.

On April 5, 1987 the district court granted defendants' motion to set aside the default judgment on the libel claim on

the ground that it had lacked subject matter jurisdiction under the FSIA, 28 U.S.C. § 1605, to enter the judgment. 658 F. Supp. at 1234. The court however denied defendant V/O Medexport's motion to set aside the default judgment on the contract claims, holding that defendants had not demonstrated that they were entitled to relief from judgment under Fed. R. Civ. P. 60(b)(4) and (6). *Id.* at 1236, 1239.

DISCUSSION

I. Libel Claim

Plaintiffs contend that the Soviet trading organizations V/O Medexport and V/O Licensintorg attempted to avoid their alleged contractual commitments to CIT by "causing to be published" libelous statements in *Izvestia*, the newspaper published by the Soviet government. Answering and Reply Brief on Behalf of Appellants, at 25. Plaintiffs believe that the district court erred in setting aside the default judgment on the libel claim on the basis of lack of subject matter jurisdiction. Defendants argue that the issue is not properly before this court because of an improper Rule 54(b) certification; that the FSIA does not provide jurisdiction over such a claim but rather confers immunity from the claim on defendants; and that the act of state doctrine bars adjudication of the libel claim. Because we conclude that the issue was properly certified under Rule 54(b) of the Federal Rules of Civil Procedure, and that the FSIA does not provide subject matter jurisdiction over the libel claim, there is no need for us to rule on the applicability of the act of state doctrine.

A. Rule 54(b) Certification

On December 18, 1987 the district court granted plaintiffs' request for a Rule 54(b) certification of the order dismissing the libel claim. C.R. 180.[3] This permitted plaintiffs to appeal

[3] "C.R." refers to the Clerk's Record; the number following identifies the document.

the dismissal of their libel claim. Defendants argue that the Rule 54(b) certification represented an abuse of discretion by the district court, and that the appeal is therefore improperly before this court. Defendants' position lacks merit.

Rule 54(b) provides that:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any other order or form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . , and the order or other form of decision is not subject to revision at any time before the entry of judgment adjudicating all the claims. . . .

Fed. R. Civ. P. 54(b).

Defendants argue that two of plaintiffs' claims, which are still pending in the district court, are "identical" to plaintiffs' libel claim. Therefore, defendants argue, it was error for the district court to grant a Rule 54(b) certification of the libel claim, because, under *Frank Briscoe Co., Inc. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985), "[a] similarity of legal or factual issues [still pending before the trial court] will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only where necessary to avoid a harsh and unjust result, documented by further and specific findings." In *Frank Briscoe*, the court held that the district court's Rule 54(b) certification of its order dismissing plaintiff's negligence claim was not valid because the district court's order had not disposed of a pending (conspiracy) claim, and because the district court

had not made a requisite "express determination that there is no just reason for delay." *Id.* (citing Fed. R. Civ. P. 54(b)).

Here, the district court, in its order granting the Rule 54(b) certification, expressly stated that it found "no just reason for delaying the entry of judgment" on its order dismissing the libel claim, and that "the adjudicated and unadjudicated claims are based upon substantially different factual and legal issues." C.R. 180 at 2.

In *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980), the Supreme Court articulated the standard of review for Rule 54(b) certifications. The Court stated:

> The court of appeals must . . . scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such judicial concerns have been met, the discretionary judgment of the district court should be given substantial deference . . . . The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

Id.

Thus *Curtiss-Wright* requires two enquiries. The first, consisting of scrutiny of the district court's evaluation of factors such as the interrelationship of the claims, presents a mixed question of law and fact which we generally review de novo. *See United States v. McConney*, 728 F.2d 1195, 1200-04 (9th Cir. 1984) (en banc). The second, an assessment of basically equitable concerns, is made only after the "judicial concerns" of the first step are satisfied. In the second step, we review "the trial court's assessment of the equities" for abuse of discretion, and focus on traditional equitable principles such as prejudice and delay.

On October 7, 1985, the district court found that plaintiffs had not established a right to relief sufficient to enter a default judgment against defendants on plaintiffs' claim for "Intentional Infliction of Emotional Distress" (Eleventh Claim), but the court entered no order regarding that claim, and plaintiffs have not dismissed it. The district court also granted summary judgment against plaintiffs on their claim for "Civil Conspiracy" (Fourteenth Claim), but refused to certify the summary judgment order as final pursuant to Rule 54(b). Thus, these two claims are still "pending" before the district court.

In its order granting Rule 54(b) certification of the libel claim, the district court found that the "unadjudicated claims," presumably including the Eleventh and Fourteenth Claims, and the "adjudicated" (libel) claim were "based upon substantially different factual and legal issues." Order Directing Entry of Judgment, Dec. 18, 1987, C.R. 180 at 2. Plaintiffs agree, arguing that the libel issue is distinct from the other two because it involves the "strictly legal issue regarding proper statutory construction . . . of the FSIA." Answering and Reply Brief on Behalf of Appellants, at 21. Defendants argue that the claims present "the same issues." Answering Brief of Cross-Appellees V/O Medexport and V/O Licensintorg, at 41.

Plaintiffs' Eleventh Claim, for Intentional Infliction of Emotional Distress, alleges that by means of, *inter alia*, the alleged libel, the defendants "acted intentionally to inflict severe emotional distress on Mr. Gregorian." First Amended Complaint, C.R. 2 at 22. Plaintiffs' Fourteenth Claim, for "Civil Conspiracy," however, does not explicitly refer to "libel" but simply realleges and incorporates all of the previous paragraphs of the complaint. *Id.* at 24. Nor do the facts alleged in the conspiracy claim overlap substantially with those alleged in the libel claim. The conspiracy claim alleges that defendants conspired to have *CIT's accreditation* terminated. *Id.* at 25. The libel claim, by contrast, alleges that

the *Izvestia* article was intended to and did cause *injury to Mr. Gregorian and CIT's reputations. Id.* at 19. Thus, the libel and conspiracy claims are legally and factually distinct.

[1] The interrelationship between the libel claim and the intentional infliction of emotional distress claim, therefore, appears to be the only basis for defendants' contention that the adjudicated and unadjudicated claims are "identical." The interrelationship does not, however, justify a decision that the district court erred in granting the Rule 54(b) certification. The district court could properly conclude that the factual and legal issues involved in the claim for intentional infliction of emotional distress were "substantially different" from those raised by the libel claim. Because the district court properly evaluated the relationship of the claims, we also consider the trial court's assessment of the equities. The district court did not abuse its discretion when it assessed the equities of the Rule 54(b) certification. Accordingly, plaintiffs' appeal of the district court's dismissal of the libel claim is properly before this court.

B. Libel and the FSIA

Plaintiffs allege that defendants, including *Izvestia*, V/O Medexport, V/O Licensintorg, and the U.S.S.R. "caused to be published false and libelous accusations against Mr. Gregorian, intending to injure him in his personal and business reputation, and to discredit CIT." First Amended Complaint, C.R. 2 at 19. It further alleges that the published charges were "malicious" and "calculated to . . . expose plaintiff to hatred, contempt, and ridicule . . . ." *Id.* at 20. Defendants *Izvestia* and the U.S.S.R. are alleged to have "published the article with malice either with knowledge of its falsity or with reckless disregard for whether it was true, motivated by a desire to embarrass plaintiffs and to harm them economically." *Id.* at 21.

On April 5, 1987, the district court granted defendants' motion to set aside the default judgment previously entered

on the libel claim. The district court held that its previous judgment was void for lack of subject matter jurisdiction under section 1605 of the FSIA. The court accordingly dismissed the libel claim pursuant to Fed. R. Civ. P. 12(b)(1). 658 F. Supp. at 1234. Plaintiffs now appeal from this portion of the district court's decision.

1. The Statutory Scheme

Plaintiffs argue that subject matter jurisdiction over their libel claim is conferred by the "commercial activity" exception to foreign sovereign immunity contained in the FSIA. As the following discussion will demonstrate, plaintiffs' argument rests on a misinterpretation of the FSIA and must be rejected.

The FSIA creates subject matter jurisdiction in certain instances over claims brought against foreign sovereigns by creating statutory exceptions to sovereign immunity. 28 U.S.C. § 1604. Section 1605 provides in relevant part that:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case— . . .
>
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .
> >
> > (5) *not otherwise encompassed in paragraph (2) above,* in which money damages

> are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; *except this paragraph shall not apply to*— . . .
>
> > (B) any claim arising out of malicious prosecution, abuse of process, *libel*, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605(a) (emphasis added).

Section 1605(a)(2)'s "commercial activity" exception to sovereign immunity codifies the so-called "restrictive" theory of foreign sovereign immunity, which permits adjudication of "commercial" claims against foreign states. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 57 U.S.L.W. 4121, 4123 n.1 (U.S. Jan. 24, 1989). In enacting this provision Congress thus rejected the "absolute" theory of sovereign immunity, which grants nations complete immunity from the jurisdiction of foreign courts.

The FSIA defines "commercial activity" as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

Plaintiffs contend that the allegedly libelous *Izvestia* article was published "in connection with" a "commercial activity" of the Soviet defendants, and that there is subject matter jurisdiction over the libel claim under all three of section 1605(a)(2)'s clauses. *See* Opening Brief on Behalf of Appellants, at 16-17. The "commercial activity" plaintiffs point to is *Izvestia*'s sale and distribution in this country, and its publication, circulation, and sale outside the United States. *Id.* at 17. They also argue that there is subject matter jurisdiction under the "direct effects" clause of section 1605(a)(2) because they have alleged a financial loss occurring in the United States (contract breaches by CIT's American business contacts) as a result of the Soviet action. *Id.* at 16.

Plaintiffs argue that their libel claim escapes the bar of section 1605(a)(5)(B) because that clause, in their view, only bars jurisdiction of "non-commercial" torts. Their libel claim, they contend, is a "commercial" tort ("trade libel") and therefore can be adjudicated under the "commercial activity" clauses of section 1605(a)(2).

2. Commercial Activity

We cannot accept plaintiffs' contention that the FSIA provides jurisdiction over the "commercial" or trade libel claim they assert. Under the FSIA, activities are to be characterized according to their nature, not their purpose. 28 U.S.C. § 1603(d). Here, plaintiffs are contending that the alleged libel was published with the *purpose* of injuring plaintiffs by avoiding commercial obligations. In other words, plaintiffs' characterization of the alleged libel as "commercial" rests on "reference to its purpose." *Id.* The *nature* of the *Izvestia* article, by contrast, is clearly governmental. Articles published in *Izvestia* have been characterized as "official commentary of the Soviet government." *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 856 (S.D.N.Y. 1978). "Whether or not the Court admires the tone of such commentary, it cannot be gainsaid that it constitutes 'an activity

whose essential nature is public or governmental.'" *Id.* (concluding that TASS and Novosti Press Agency were immune under FSIA from libel suit based on articles published in *Izvestia* and three other Soviet journals).

We agree with *amicus curiae* United States that *Izvestia*'s "writing and publishing of articles reporting or commenting on events" constitute "sovereign or governmental" activities. Statement of Interest of the United States, at 24. *Izvestia* is the organ of the Soviets of Working People's Deputies, and is published by the Presidium of the Supreme Soviet of the U.S.S.R. According to the United States, "*Izvestia* is the voice of an official Soviet agency, [and] the determination of its contents can be carried out only by a governmental entity; thus, publishing a particular article in *Izvestia* is a sovereign, governmental function." *Id.* The governmental nature of *Izvestia*'s publication and distribution defeats plaintiffs' argument that its sale is sufficient to afford jurisdiction under section 1605(a)(2).[4]

[2] In conclusion, then, we hold that the activity which

[4]Plaintiffs' "trade libel" argument was designed to establish jurisdiction under section 1605(a)(2); the trade libel argument does not seek an exception to immunity under section 1605(a)(5). Nor could plaintiffs have established subject matter jurisdiction for their libel claim under section 1605(a)(5). This is because, contrary to plaintiffs' contention, the bar against "libel" claims contained in section 1605(a)(5)(B) must be construed to include claims of "trade libel." As *amicus curiae* United States correctly points out, a contrary interpretation would yield nonsensical results. Statement of Interest of the United States, at 15. For example, foreign sovereign immunity is expressly retained in section 1605(a)(5)(B) for claims of "interference with contract rights" as well as for libel claims. As the United States observes, contract rights cases will almost always involve commercial activity, and it would have been odd for Congress, without saying so clearly, to have retained immunity for such claims only in the unusual situation in which entirely non-commercial activity was involved. *Id.* at 15-16. We agree that it is far more likely that Congress meant the clauses retaining immunity in section 1605(a)(5)(B) to deny jurisdiction over any claims alleging the torts listed.

brought about the publication of the allegedly libelous article in *Izvestia* was governmental rather than commercial in nature for purposes of section 1605(a)(2) of the FSIA. The district court therefore correctly granted defendants' motion to set aside the default judgment, and properly dismissed the libel claim for lack of subject matter jurisdiction.

II. Contract Claims

In its Order of April 5, 1987, the district court declined to set aside the default judgment on the breach of contract claims. 658 F. Supp. at 1234-39. The court denied defendant's Rule 60(b)(4) motion to set aside the default judgment for lack of jurisdiction. It held that the "direct effect" clause of section 1605(a)(2) of the FSIA provided subject matter jurisdiction over the contract claims. *Id.* at 1234. The district court also determined that V/O Medexport and V/O Licensintorg were not "separate juridical entities" from the U.S.S.R. *Id.* at 1236. It therefore held that contacts between the U.S.S.R., including its missions and Ministry of Foreign Trade, and the U.S. could be attributed to the Soviet trading organizations as the basis for asserting personal jurisdiction over them. *Id.* Finally, the district court held that relief from the default judgment under Rule 60(b)(6) was inappropriate because the Soviet defendants had been "culpable" in not originally appearing to defend the action. *Id.* at 1237-39.

Defendant V/O Medexport[5] appeals from the denial of its Rule 60(b) motions. We hold that the district court erred in denying defendant's Rule 60(b)(6) motion and on that ground we vacate the default judgment and remand this case to the district court for further proceedings. Because we base this

[5]The district court erroneously treated V/O Licensintorg as a "defendant" for purposes of the Rule 60(b)(4) and Rule 60(b)(6) motions. 658 F. Supp. at 1234-39. In fact, V/O Licensintorg was not named as a defendant in any of the breach of contract claims of plaintiffs' complaint. C.R. 2 at 14-17.

result on our resolution of the Rule 60(b)(6) issue, we do not decide whether the FSIA provides personal or subject matter jurisdiction over the contract claims. We remand these latter issues to the district court for further development of the facts in accordance with the guidance provided below.

A. The Rule 60(b)(6) Motion

Defendant moved under Rule 60(b)(6) to have the district court set aside the default judgment. Subsection (6) of Rule 60(b) allows a court to vacate a judgment "for any other reason justifying relief . . . ." Fed. R. Civ. P. 60(b)(6). The district court denied the motion, ruling that defendant's nonappearance had been "culpable." 658 F. Supp. at 1238-39. Defendant and *amicus curiae* United States argue that the district court abused its discretion in denying the Rule 60(b)(6) motion. We agree.

While a district court has discretion to grant or deny a Rule 60(b) motion to vacate a default judgment, that discretion is limited by three policy considerations. First, since Rule 60(b) is remedial in nature, it must be liberally applied. *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir.), *cert. denied*, 108 S. Ct. 486, 487 (1987). Second, default judgments are generally disfavored, and "[w]henever it is reasonably possible, cases should be decided upon their merits." *Pena v. Seguros Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). Third, where a defendant seeks timely relief from the judgment and has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment. *Meadows*, 817 F.2d at 521.

In this circuit, a district court has discretion to deny a Rule 60(b) motion to vacate a default judgment if (1) the plaintiff would be prejudiced if the judgment is set aside; (2) the defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default. *Id.*

In the present case, the district court found that "prejudice to plaintiffs from vacating the default judgment would not be significant . . . ." 658 F. Supp. at 1237. It further found that defendants had a "meritorious" defense, because "[i]f the facts that defendants allege are true, they would prevail." *Id.* The court observed that the motion to vacate was made three months after the judgment and thus was timely at least "in the sense of occurring at an opportune moment." *Id.* The district court however found that defendant's nonappearance in the action prior to the entry of default judgment constituted "culpable conduct" rendering the motion untimely and justifying denial of the Rule 60(b)(6) motion. *Id.* at 1237-39. This finding was incorrect.

[3] We have stated that a defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer. *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir.), *cert. denied*, 108 S. Ct. 486, 487 (1987). Defendants do not dispute the fact that they had notice of the action. Their conduct thus appears at first glance to be "culpable." However, this case is distinguishable from those cases in which we have found a party's conduct to be culpable.

1. "Culpable Conduct"

The district court based its finding that defendants' conduct had been "culpable" on their noncompliance with United States law, namely the FSIA. 658 F. Supp. at 1237-38. The court "[did] not take issue with defendants' continued adherence to their view that under international law the USSR is absolutely immune from suit in foreign courts." *Id.* at 1238. The court stated, however, that while defendants' "adherence to a view that is contrary to law" did not constitute culpable conduct, their "action upon that belief" did. *Id.*

In reaching this conclusion, however, the district court failed to look beyond the broad "view" or "belief" of the

Soviet Union regarding foreign sovereign immunity, to the specific reasoning that led to V/O Medexport's refusal to appear before the court prior to the entry of default judgment. According to defendant, its initial refusal to appear was the result of the centrality to plaintiffs' complaint of the "libel" claim. Believing that neither international nor U.S. law provided jurisdiction over libel claims made against foreign states, and also believing that the district court had based its assertion of jurisdiction over the entire action on an erroneous refusal to accord defendants immunity from the libel claim, the Soviet defendants refused to appear in the action.

Amicus curiae United States supports this explanation, and argued to the district court that the Soviet government's "peculiar sensitivity to the charge of libel in the present proceedings" underlay defendant's nonappearance. Statement of Interest of the United States, C.R. 71 at 3. The United States pointed out that while "[p]rivate counsel has appeared in a limited number of commercial and tort cases brought jointly against the Soviet government and its instrumentalities," *id.* at 16, "[t]o our knowledge no Soviet defendant has ever appeared in a libel case where the Soviet Union is among the named defendants." *Id.* at 29.

Plaintiffs believe that this explanation for defendants' nonappearance is irrelevant. Plaintiffs rely on *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir.), *cert. denied*, 108 S. Ct. 486, 487 (1987), for the proposition that we may not reverse a district court's refusal to set aside a default judgment under Rule 60(b)(6) where a foreign defendant had notice of the action and nonetheless failed to appear. In *Meadows*, the plaintiff brought an action in district court for breach of contract against the Dominican Republic ("the Republic") and an affiliated institution. The plaintiff alleged that defendants had failed to pay a commission owed to him for obtaining a loan for the institution. Plaintiff attempted to serve defendants with summons and a copy of the complaint by mail, with return receipt requested. No return receipts

were received. Plaintiff then sent a letter to the United States Department of State, as required by 28 U.S.C. section 1608(a)(4), requesting service on the Republic. The Department of State accordingly effected service on the Republic's Foreign Ministry, and gave the Republic detailed warnings of the legal consequences of a failure to respond to the complaint. When defendants did not respond, default judgment was entered against them. Defendants subsequently moved the district court to set aside the default judgment; the court denied the motion.

On appeal, we affirmed. *Meadows*, 817 F.2d 517. We held that the foreign sovereign defendants' nonappearance had been "culpable" because they had received notice of the action and failed to answer, and because the record failed to support their contention that they had not appeared on the advice of their Undersecretary of Foreign Affairs. *Id.* at 521-22.

This last fact clearly differentiates *Meadows* from the present case. In *Meadows* there was no credible evidence that the foreign sovereign had instructed the defendants to refuse to appear in the proceeding; in fact, the Undersecretary of Foreign Affairs denied responsibility for the decision not to respond. *Id.* In the present case, by contrast, it is undisputed that the Soviet government instructed V/O Medexport not to enter an appearance prior to the entry of the default judgments. *Meadows* therefore does not require that we affirm the district court's holding that V/O Medexport's conduct was "culpable" for purposes of Rule 60(b)(6).

Nor is the present case governed by *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985), another case relied on by plaintiffs. In *Pena*, we upheld the district court's refusal to set aside the default judgment entered after defendant, a foreign insurance company, failed to appear in plaintiff's action for tortious breach of insurance contract, on the ground that defendant had not only been properly served

with notice of the action under state law, but had also been "culpable" in providing both plaintiff and the state insurance department (through which service was made on defendant pursuant to state law) with an incorrect address. *Id.* at 815. In *Pena*, unlike the present case, defandant did not argue that its nonappearance stemmed from a belief that that it was not subject to suit in a United States court for the claim alleged. The *Pena* defendant's contention rather was that it had not received adequate notice of the action and for that reason had not been obligated to make an appearance. We held that this contention was without foundation, and in addition held that the defendant had violated its "duty to comply with the laws of [the] state" by failing to keep the state's department of insurance "apprised of its correct address." *Id.* We called this latter failure "culpable conduct." *Id.* Thus the element of culpability in *Pena* was not simply nonappearance following receipt of notice of the action, but rather conduct which hindered judicial proceedings as to which subject matter jurisdiction was unchallenged. Here, by contrast, defendants argued that their government had instructed them not to appear because of the Soviet government's belief that its instrumentalities are immune from suit for libel claims brought in foreign courts. V/O Medexport's nonappearance thus did not represent a flouting of the relevant U.S. law but rather stemmed from its government's belief that it was immune from suit under the FSIA for claims of libel such as plaintiffs'. Our prior decisions interpreting Rule 60(b)(6) do not, therefore, support the district court's conclusion that V/O Medexport's nonappearance constituted "culpable conduct."

The Eleventh Circuit's opinion in *Jackson v. People's Republic of China*, 794 F.2d 1490, 1494-97 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1371 (1987), provides authority counseling against a finding of "culpable conduct" in the present case. In *Jackson*, the Eleventh Circuit affirmed the district court's decision to set aside a default judgment entered against the People's Republic of China ("PRC") in an action

for payment of bearer bonds. Plaintiffs, holders of the defaulted bonds, sought jurisdiction over their action under the FSIA. They effected service of process upon the PRC pursuant to 28 U.S.C. section 1608(a)(4). The PRC responded with a diplomatic note to the United States Department of State asserting that it enjoyed absolute sovereign immunity. The district court ordered a default judgment against the PRC after it failed to appear. *Id.* at 1492.

When plaintiffs began efforts to execute on their judgment, the PRC appeared in the case for the first time, filing motions to vacate the judgment under Rule 60(b)(1), (4), and (6), and to dismiss the case. The United States filed Statements of Interest backing the PRC's motions. *Id.* The district court granted the motion to vacate and ordered the case dismissed for lack of subject matter jurisdiction. *Id.*

On appeal, the Eleventh Circuit affirmed the district court's judgments. In particular, the court held that the district court had not abused its discretion in granting the PRC's motion to vacate the default judgment under Rule 60(b)(6). *Id.* at 1494. In so ruling, the court rejected plaintiffs' argument that the PRC was not entitled to equitable relief under Rule 60(b)(6) because the PRC had acted "inequitably" in continuing to insist that as a matter of international law it enjoyed absolute sovereign immunity. The court responded to this argument as follows:

> We reject out of hand the contention that in seeking an adjudication of jurisdictional issues arising out of United States domestic law China acts improperly in reserving what it conceives are its rights under international law.

Id. at 1496-97.

[4] We are persuaded by the Eleventh Circuit's reasoning. We therefore hold that where, as here, a foreign sovereign

defendant's reasonable belief that it is immune from suit leads it to refuse to appear in an action brought under the FSIA, a court may not characterize this refusal as "culpable conduct" for purposes of a Rule 60(b) motion to set aside a default judgment. Moreover, it is not "culpable conduct" within the meaning of *Meadows* and *Pena* for a foreign sovereign to instruct its corporations or other domestic entities to act in conformity with its own notions of immunity until it has received a definitive indication to the contrary from the United States courts. It follows that the Soviet defendants' reasonable belief that they were not subject to jurisdiction in United States courts with respect to the libel claim, and their reasonable belief that the district court's assertion of jurisdiction over the entire action was based on an erroneous assertion of jurisdiction over the libel claim, undercuts any argument that the Soviet defendants were "culpable" in not appearing to defend the action. For this reason, we hold that the district court abused its discretion in denying defendant's Rule 60(b)(6) motion to set aside the default judgment.

2. "Extraordinary Circumstances"

The district court observed that relief under Rule 60(b)(6) is "reserved for 'extraordinary circumstances,' " and that to rule on defendant's Rule 60(b)(6) motion the court therefore had to "determin[e] whether the foreign policy overtones that this case has assumed present the 'extraordinary circumstances' that justify setting aside the judgment." 658 F. Supp. at 1238 (citing *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981)). The court concluded that no such "extraordinary circumstances" existed. *Id.* at 1238-39. Although our holding that defendant had not engaged in "culpable conduct" is the basis for our reversal of the district court's denial of defendant's Rule 60(b)(6) motion, we will briefly address the "extraordinary circumstances" issue.

The district court erred in requiring defendants to demonstrate the existence of "extraordinary circumstances" in addi-

tion to satisfying the three-part *Meadows* test, *supra*, in order to obtain relief from the default judgment under Rule 60(b)(6). "Extraordinary circumstances" analysis has in fact been supplanted by the three-part test applied in *Meadows* and *Pena*. *See Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam).[6] Therefore, the district court's determination that the case does not present "extraordinary circumstances" does not support its refusal to set aside the default judgment under Rule 60(b)(6).

B. The Rule 60(b)(4) Motion

[5] In support of its Rule 60(b)(4)[7] motion defendant argued that the default judgment was void for lack of personal and subject matter jurisdiction. C.R. 79 at 8, 12-16.[8] The district court denied the motion, holding that subject matter jurisdiction over plaintiffs' contract claims was found in the third, or "direct effect," clause of 28 U.S.C. section 1605(a)(2), and that the court had personal jurisdiction over the defendants under 28 U.S.C. section 1330(b). Because we reverse the district court's Rule 60(b)(6) ruling, there is no need for us to decide whether it correctly denied defendants' Rule 60(b)(4) motion. However, on remand the district court may need to address the issues of personal and subject matter

[6]In applying the "extraordinary circumstances" test, the district court relied on our decision in *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981). The *Corex* case, however, represents the approach to default judgments followed by this court prior to our 1984 *Falk* decision.

[7]Rule 60(b)(4) states: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." Fed. R. Civ. P. 60(b)(4).

[8]Plaintiffs contend that "[t]he Soviet defendant's failure to raise the issue of subject matter jurisdiction below prevents them from raising it for the first time on this appeal." Answering and Reply Brief on Behalf of Appellants, at 2. This is a plain misstatement of the law. *See, e.g., In re U. S. Financial, Inc.*, 594 F.2d 1275, 1282 (9th Cir. 1979).

jurisdiction under the FSIA; therefore, we will discuss these issues to provide guidance in these potentially difficult areas.

1. Subject Matter Jurisdiction under the FSIA

The third, or "direct effect," clause of FSIA section 1605(a)(2) states:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case — . . .
>
> > (2) in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a *direct effect* in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added).

The district court held that subject matter jurisdiction over plaintiffs' contract claims was provided by this clause. 658 F. Supp. at 1234. Defendant argues that the district erred in finding subject matter jurisdiction under the "direct effect" clause of section 1605(a)(2), and that the denial of its Rule 60(b)(4) motion was therefore improper.

A "direct effect" is one that is substantial and forseeable. *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988). We have construed the "direct effect" clause of section 1605(a)(2) to provide subject matter jurisdiction over breach of contract claims where plaintiffs were U.S. citizens or corporations *and* where the contracts provided for payments to be made in the United States. *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 108 S. Ct. 486, 487 (1987). *See also Zedan v. Kingdom of Saudi Arabia*, 849 F.2d at 1514-15; *Texas Trading & Mill-*

ing Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). However, mere financial loss suffered by a plaintiff in the United States as a result of the action abroad of a foreign state does not constitute a "direct effect" and therefore cannot by itself create subject matter jurisdiction under section 1605(a)(2). *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d at 1515. Thus to establish a "direct effect" in the United States resulting from an act occurring abroad, a plaintiff must establish that "something legally significant actually happened in the U.S." *Id.*

Plaintiffs allege two facts that are relevant to the determination of "direct effect" jurisdiction under section 1605(a)(2) of the FSIA. First, they allege that "defendant [presumably V/O Medexport] visited California in connection with contracts at issue." Answering and Reply Brief on Behalf of Appellants, at 11 n.1. In support of this assertion, plaintiffs cite their Memorandum of Points and Authorities in Opposition to Motion to Vacate ("Memorandum"). C.R. 86 at 19-22. In that document, plaintiffs assert that contract negotiations regarding various items of medical equipment were conducted by "Soviet defendants when their representatives were in Palo Alto, California . . . ." *Id.* at 20.

Second, plaintiffs assert that the alleged contracts "called for payment to plaintiffs in the United States." Answering and Reply Brief on Behalf of Appellants, at 8 n.1. The corresponding assertion in their Memorandum states that "[a]ll payments for the transactions which are the basis for the [breach of contract claims] . . . were to be made by V/O Medexport to CIT in California." C.R. 86 at 21.

The district court did not mention these alleged facts in its discussion of subject matter jurisdiction. 658 F. Supp. at 1234. The court did not point to any provision of the alleged agreements between V/O Medexport and plaintiffs that created a nexus between defendant's activities and the United States. The court did state that the acts plaintiffs complain of

"resulted in the failure of Soviet and American banks to transfer payment from the USSR to plaintiffs in California." *Id.* at 1234.

In *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, the District of Columbia Circuit stated that to establish subject matter jurisdiction under the FSIA's "direct effect" clause, something "legally significant," such as the incurring of a debt by defendant, must happen in the United States. *Id.* at 1515. The court also suggested that a foreign state's breach of a contractual promise "to make payment [to plaintiff] in the United States" might support subject matter jurisdiction under the "direct effect" clause of the FSIA. *Id.* at 1514.[9]

Plaintiffs have alleged facts which might support subject matter jurisdiction under both of *Zedan*'s factors. However, the "facts" urged by plaintiffs as the basis for subject matter jurisdiction over the contract claims were not pleaded in the plaintiffs' complaint. Instead, plaintiffs first alleged the above-described facts supporting jurisdiction in their Memorandum, which they submitted in January of 1987, two years after first bringing suit. C.R. 86. The Memorandum in turn relies on Gregorian's declaration of November 29, 1986 (the "Palo Alto Declaration"), in which he asserted that in October 1982 in Palo Alto he "gave [V/O Medexport representatives] . . . a price quote [for the "Technicon" equipment] and the V/O Medexport representatives accepted." C.R. 86 at 97.

Defendant attacks the 1986 Palo Alto Declaration and suggests that Gregorian manufactured these jurisdictional

[9]The *Zedan* court however declined "to reach the question whether a breach of a specific contract to make a payment in the United States, where the commercial activity involved was carried on entirely outside the United States, would be sufficient to cause a direct effect within the meaning of [the "direct effect" clause of 28 U.S.C. section 1605(a)(2)] . . . ." 849 F.2d at 1515 n.2. Nor do we decide that question. We simply note the relevance of a contractual provision for payment in the U.S. to the question of subject matter jurisdiction under the FSIA.

"facts" at this late date in order to "improve" upon a previous (1985) affidavit that did not aver these same "facts." Opening Brief on Behalf of Appellant V/O Medexport, at 13-15. Defendant contends that "there is no pre-litigation confirmation in writing of *any* of the various 'promises' . . . ascribed to unspecified representatives of V/O Medexport in . . . the Palo Alto declaration." *Id.* at 14-15.

We do not here resolve this dispute over the jurisdictional facts.[10] On remand, the district court should assess the credibility of the evidence offered by the parties and make findings with respect to the factual basis of plaintiffs' assertion of "direct effect" jurisdiction.[11]

---

[10]The district court based its holding of subject matter jurisdiction not only upon the alleged "contractual disputes between plaintiffs and Soviet defendants," but also upon "the defamatory *Izvestia* article, which was printed in the USSR and circulated in the United States . . . [and thus] may be seen as a direct effect of the defendants' acts." 658 F. Supp at 1234. However, the alleged libel contained in the *Izvestia* article cannot serve as a basis for subject matter jurisdiction over the contract claims because it was not a "direct effect" of defendant's alleged breach of contract; the libel, if it occurred, would have been produced by intervening actions.

[11]After the district court ruled on the Rule 60(b) motions, this court decided *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir.), *cert. denied*, 108 S. Ct. 486, 487 (1987). In that case, we affirmed the district court's finding of subject matter jurisdiction under the FSIA because the record showed that the challenged action of the foreign sovereign, the obtaining of a loan commitment, was a "commercial transaction" which caused a "direct effect to occur in the United States." *Id.* at 523. In reaching this conclusion, we articulated the following test for determining jurisdiction under the FSIA:

> '[T]he presumption under FSIA is that actions taken by foreign states or their instrumentalities are sovereign acts and thus protected from the exercise of our jurisdiction, unless one of the enumerated exceptions of FSIA applies.' . . . . Thus, where, as here, the plaintiff alleges in his complaint that his claim is based on a foreign state's strictly commercial acts, the defendant must establish a prima facie case that it is a sovereign state and that the plaintiff's claim arises out of a public act. This proof establishes a

2. Personal Jurisdiction

The district court, in its Order of April 5, 1987, held that it had personal jurisdiction over the "defendants" under 28 U.S.C. § 1330(b) of the FSIA and the "minimum contacts" due process standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). 658 F. Supp. at 1234-36. Under section 1330(b), "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under [the FSIA] . . . where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b) (1976). This section "grants the district courts personal jurisdiction over foreign states in situations in which those states are not entitled to sovereign immunity, as determined in [FSIA] §§ 1605-1607, and when service has been made pursuant to § 1608." *Thos. P. Gonzalez Corp. v. Consejo Nactional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980).[12] Thus if defendants are entitled to immunity under the FSIA, there can be no personal jurisdiction over them. However, if defendants are *not* entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process clause preclude the assertion of personal jurisdiction over them. "Personal

---

presumption that the foreign state is protected by immunity. The plaintiff then has the burden of going forward with the evidence by offering proof that one of the FSIA exemptions applies. Once the plaintiff has presented this evidence, the defendant must prove its entitlement to immunity by a preponderance of the evidence.

Id. at 522-23. We distilled this test from the House Report containing the legislative history of the FSIA. *Id.* at 522 (quoting from H. R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 Code Cong. & Ad. News 6604, 6616).

Because *Meadows* is now the law of this circuit, the district court should apply that case's test if the court decides the issue of subject matter jurisdiction on remand.

[12]Defendant does not dispute the validity of the service of process made on it.

jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard." *Id.* at 1255.

In order to analyze the relevant contacts, the court must first ask: "whose contacts, and with what?" *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

(a) Whose Contacts?

(i) V/O Licensintorg

The district court erred in considering the "contacts" of defendant V/O Licensintorg. *See* 658 F. Supp. at 1234-36. In its Order of June 25, 1986, the district court entered default judgment only on Claims 5 through 8 (the "contract claims") and the libel claim (Claim 10). C.R. 44 at 1. V/O Licensintorg is not named as a defendant in Claims 5 through 8. *See* First Amended Complaint, C.R. 2 at 14-18. Thus to the extent that the district court "counted" V/O Licensintorg's contacts in determining that it had personal jurisdiction over defendant V/O Medexport with respect to the contract claims, it was in error.

(ii) "Separate Juridical Entity"

In its order denying the Rule 60(b)(4) motion to vacate the default judgment, the district court considered, as "contacts" of V/O Medexport, the activities of the Soviet Embassy in Washington, D.C. and the Soviet Consulate in San Francisco. As a result, it found sufficient contacts between V/O Medexport (and V/O Licensintorg) and the United States to justify assertion of personal jurisdiction. 658 F. Supp. at 1236. The court stated that it "views defendant trade organizations, both generally and specifically with regard to this action, as integral parts of that [Soviet] State which enjoys representation through diplomatic and trade missions around the world." *Id.* The court therefore attributed all of the U.S.S.R.'s

diplomatic and trade contacts in the United States to V/O Medexport.

The district court also attributed the "payment activities of BankAmerica, Chase Manhatten Bank, and the Bank of Foreign Trade in New York and California . . . to defendants." *Id.* at 1235. The court asserted that "[i]f these banks had not at various times performed for defendants, the entire payment mechanism supporting the relationship between plaintiffs and defendants would have ceased to exist." *Id.*

Lastly, the district court took note of the Certificate of Accreditation issued by the U.S.S.R. to CIT. This Certificate stated that while CIT could deal with Soviet organizations "concerning questions of buying and selling, [CIT must operate] only through the Ministry of Foreign Trade." 658 F. Supp. at 1235. The court concluded that V/O Medexport was either an "agent[] or alter ego[] of the Ministry," *id.*, and thus not entitled to separate juridical status. *Id.* at 1236.

On the basis of the activities of the Soviet trade and diplomatic missions in the U.S., the banks enumerated above, and the supposed agency relationship between V/O Medexport and the Soviet Ministry of Foreign Trade, the court concluded that personal jurisdiction over defendants was appropriate. *Id.*

Defendant and the United States argue that, on the contrary, V/O Medexport has a "separate juridical existence" from the Soviet State, and that for purposes of personal jurisdiction only V/O Medexport's "contacts" are relevant. Opening Brief on Behalf of Appellant V/O Medexport, at 30-32; Statement of Interest of the United States, at 32-35. They point to the Supreme Court's statement, in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 626-27 (1983), that "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations . . . leads us to conclude . . . that gov-

ernmental instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." The Court found that FSIA embodied a "presumption of independent status" for "duly created instrumentalities of a foreign state." *Id.* at 627.

V/O Medexport argues that the Certificate of Accreditation's directive that CIT operate through the Ministry of Foreign Trade is merely an "administrative requirement" that is irrelevant to the determination of separate juridical existence. Opening Brief on Behalf of Appellant V/O Medexport, at 32. Defendant also offered the testimony of a Soviet lawyer that Soviet trading organizations have separate juridical existence under Soviet law. C.R. 121 at ¶ 5.

The district court admitted that Soviet law may in fact "confer[] juridical separateness upon Soviet trading organizations," *id.* at 1235, but it chose to look instead at what it called "the essential realities of the organizations' existence" in declining to recognize the juridical separateness of V/O Medexport. *Id.* The court thus disregarded the guidance of *Bancec* by refusing to accord the presumption of independent status to a duly created instrumentality. We do not believe that plaintiffs have rebutted the presumption of V/O Medexport's separate juridical existence. Therefore, on remand the district court should not count as contacts of V/O Medexport the activities of the Soviet Ministry of Foreign Trade, the Soviet Embassy, the Soviet Consulate, BankAmerica, Chase Manhatten Bank, or the Bank for Foreign Trade. The district court should consider only V/O Medexport's contacts with the U.S. in determining whether assertion of personal jurisdiction over V/O Medexport satisfies the requirements of due process.

(b) Contacts with What?

The district court "aggregated" all of defendants' contacts with the entire United States, rather than looking only to con-

tacts with the forum state (California). The court relied on the Second Circuit's opinion in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), in which the court, addressing the issue of perso al jurisdiction under the FSIA, stated:

> Since service [on Nigeria and its Central Bank] was made under [28 U.S.C.] § 1608, the relevant area in delineating contacts is the entire United States, not merely New York [the forum state].

Id. at 314. The Ninth Circuit has adopted the *Texas Trading* approach to determining relevant contacts. *See Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 108 S. Ct. 486, 487 (1987) (citing *Meadows v. Dominican Republic*, 628 F. Supp. 599, 605-08 (N.D. Cal. 1986)). Thus the district court properly "aggregated" all contacts with the United States rather than only considering those contacts with California.[13]

AFFIRMED IN PART, and REVERSED and REMANDED IN PART.

The parties shall bear their own costs.

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[13]It should be noted however that the Supreme Court has declined to rule on the constitutionality of "aggregation of contacts" theory. In an opinion not cited in *Meadows*, Justice O'Connor wrote:

> We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the state in which the federal court sits.

Asahi Metal Ind. v. Superior Court, 107 S. Ct. 1026, 1033 n.** (1987) (plurality portion of opinion).

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Court of Appeals
Docket No. CA-88-5562

District Court Docket
No. CV 85-0100-KN

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAPHAEL GREGORIAN and
CALIFORNIA INTERNATIONAL TRADE CORPORATION,
Plaintiffs/Appellants,

VS.

IZVESTIA; MINISTRY OF FOREIGN TRADE OF THE UNION OF SOVIET SOCIALIST REPUBLICS;
V/O MEDEXPORT, UNION OF SOVIET SOCIALIST REPUBLICS;
V/O LICENSINTORG, UNION OF SOVIET SOCIALIST REPUBLICS;
UNION OF SOVIET SOCIALIST REPUBLICS,
Defendants/Appellees.

Appeal From the April 5, 1987 Order
of the United States District Court
Central District of California,
Honorable David V. Kenyon, Judge.

OPENING BRIEF ON BEHALF OF APPELLANTS

KROLL & FIRESTONE
GERALD L. KROLL, ESQ.
1801 Century Park East
Suite 1500
Los Angeles, California 90067
Telephone: (213) 557-1756
Attorneys for
Plaintiffs/Appellants

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

CERTIFICATION AS TO INTERESTED PARTIES REQUIRED BY NINTH CIRCUIT COURT OF APPEALS RULE 13(b)(3)

The undersigned, counsel of record of Plaintiffs and Appellants Raphael Gregorian and California International Trade Corporation, certifies that the following parties have an interest in the outcome of this case. This representation is made to enable judges of the court to evaluate possible disqualification or recusal.

1. Plaintiffs and Appellants Raphael Gregorian and California International Trade Corporation;

2. Defendants and Appellees Izvestia; Ministry of Foreign Trade of the Union of Soviet Socialist Republics; V/O Medexport, Union of Soviet Socialist Republics; V/O Licensintorg, Union of Soviet Socialist Republics; Union of Soviet Socialist Republics;

3. Defendants Mine Safety Appliances Company and Catalyst Research, a division of Mine Safety Appliances Company;

4. Bank for Foreign Trade of the U.S.S.R.;

5. The United States Department of State;

6. The United States Department of Justice.

DATED: March 1, 1988

KROLL & FIRESTONE

By: GERALD L. KROLL
Attorneys for Plaintiffs/Appellants Raphael Gregorian and California International Trade Corporation

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Court of Appeals
Docket No. CA-88-5562

District Court Docket
No. CV 85-0100-KN

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAPHAEL GREGORIAN and
CALIFORNIA INTERNATIONAL TRADE CORPORATION,
Plaintiffs/Appellants,

VS.

IZVESTIA; MINISTRY OF FOREIGN TRADE OF THE UNION OF SOVIET SOCIALIST REPUBLICS;
V/O MEDEXPORT, UNION OF SOVIET SOCIALIST REPUBLICS;
V/O LICENSINTORG, UNION OF SOVIET SOCIALIST REPUBLICS;
UNION OF SOVIET SOCIALIST REPUBLICS,
Defendants/Appellees.

Appeal From the April 5, 1987 Order of the United States District Court Central District of California, Honorable David V. Kenyon, Judge.

OPENING BRIEF ON BEHALF OF APPELLANTS

JURISDICTION

The instant appeal is taken from the Order of the United States District Court, Central District of Califor-

nia, entered on April 5, 1987. Plaintiffs/appellants' notice of appeal was filed on December 30, 1987 following the district court's grant, on December 18, 1987, of plaintiffs/appellants' request for a Rule 54(b) certification of the issues presented herein. Plaintiffs/appellants' notice of appeal is timely under Rule 4 of the Federal Rules of Appellate Procedure. The jurisdiction of this court is invoked under 28 U.S.C. § 1332, 28 U.S.C. § 1291, and 28 U.S.C. § 1605.

STATEMENT OF ISSUES PRESENTED

I. Whether the district court erred by vacating the default judgment on the commercial libel claim, where the text of the Foreign Sovereign Immunities Act and its legislative history clearly show that subject matter jurisdiction exists under the commercial exception to sovereign immunity.

II. Whether the district court erred by engaging in judicial legislation when it held that it was "unlikely" that Congress meant what it said in the Foreign Sovereign Immunities Act.

III. Whether the district court failed to recognize trade libel as a business tort distinct from defamation, consequently fitting within the commercial activity exception to sovereign immunity under the Foreign Sovereign Immunities Act.

STANDARD OF REVIEW

As to any factual determinations made by the district court, a clearly erroneous standard is applicable. *Johnson v. United States Postal Service*, 756 F.2d 1461 (9th Cir. 1985). Rulings by the district court on questions of law

are subject to *de novo* review. *See Kelson v. Springfield*, 767 F.2d 651 (9th Cir. 1985).

STATEMENT OF THE CASE

The instant appeal stems from plaintiffs/appellants' First Amended Complaint alleging, *inter alia*, libel against the Soviet newspaper *Izvestia*, the U.S.S.R., the Ministry of Foreign Trade of the U.S.S.R., and two Soviet foreign trading organizations (V/O Medexport and V/O Licensintorg), and breach of contract against the U.S.S.R., V/O Medexport and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2]. After duly effecting service of process upon the Soviet defendants, the Soviet defendants elected to ignore the action and their defaults were entered by the Clerk on August 13, 1985 [C.R. 25; C.R. 28]. In July 1986 the district court granted a default judgment in favor of plaintiffs/appellants on the breach of contract and libel claims [C.R. 44; C.R. 45].

On November 28, 1986 two of the defendants in the action, V/O Medexport and V/O Licensintorg, foreign trading organizations of the Union of Soviet Socialist Republics (U.S.S.R.), moved pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the default judgment entered against them on the contract claims and the libel claim and to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(2) [C.R. 62].

On April 5, 1987 the district court ruled as follows:

1. The court found its previous judgment as to libel to be lacking for subject matter jurisdiction under 28 U.S.C. § 1605, set it aside as void pursuant to Fed. R. Civ. P. 60(b)(4) and dismissed the libel claim pursuant to Fed. R. Civ. P. 12(b)(1) [C.R. 141 at 19].

2. The court denied the defendants' motion to set aside the judgment and dismiss the contract claims pursuant to Fed. R. Civ. P. 60(b)(4) and 12(b)(2) [C.R. 141 at 26-27].

Appellants appeal from the district court's Order with respect to the libel claim.

STATEMENT OF FACTS

For 14 years prior to Autumn 1984, Raphael Gregorian, an American citizen, and California International Trade Corporation (CIT), a California corporation, were engaged in the business of exporting medical and laboratory goods to the Soviet Union. The products sold included such items as kidney dialysis machines, heart-lung machines, and batteries for heart pacemakers. The Ministry of Foreign Trade, U.S.S.R., two foreign trading organizations, V/O Medexport and V/O Licensintorg, were among their customers.

In 1982 the Ministry of Foreign Trade of the U.S.S.R. awarded "accreditation" to CIT [C.R. 2, at 9], thereby enabling CIT to employ Soviet personnel and to maintain an office in Moscow with telephone and telex equipment. Accreditation was a crowning achievement for CIT, earned by more than ten years of hard work that had been exemplified by numerous awards for its outstanding efforts in the Soviet marketplace. CIT's accreditation by the Ministry of Foreign Trade of the U.S.S.R. underscored the high regard, prestige and status that CIT and Mr. Gregorian had achieved in the U.S.S.R. [C.R. 2, at 6].

By November 1, 1984, the Soviets' failure to pay for medical equipment purchased from CIT presented a serious situation. The Soviets had purchased one of the items of equipment, a Blood Chemistry Analyzer, in 1982 [C.R.

2, at 14, fifth claim for relief] and the remaining items in dispute in March 1984 (Mennen medical equipment) [C.R. 2, at 15, fifth claim for relief] and June 1984 (a Heart-Lung machine) [C.R. 2, at 16, seventh claim for relief]. CIT had shipped all the items to the Soviet Union at or about the time of their purchase and they were in use in Soviet hospitals.

Having already failed to pay CIT for goods shipped, the Soviet defendants attempted to ensure their ability to avoid payment. First, on November 10, 1984, the Ministry of Foreign Trade stripped CIT of its accredition to do business in the U.S.S.R. Second, on November 18, 1984, the Soviet newspaper *Izvestia* printed an article entitled "Duplicitous Negotiator: A Story about a U.S. Firm and an Abuse of Trust." In addition to accusing Mr. Gregorian and CIT of bribery, smuggling and other unscrupulous business practices, the article effectively accused Mr. Gregorian of spying on behalf of United States intelligence agencies. [C.R. 2, at 19-21, Exhibit "F"].

The newspaper *Izvestia* is sold not only in California, but in other parts of the United States and throughout the world [C.R. 141, at 2-3].

The false Soviet allegations served to demolish CIT and severely damage Raphael Gregorian, its President. For example, even though the ink was not yet dry in the *Izvestia* article, Catalyst Research (hereinafter "Catalyst") a division of Mine Safety Appliances Corporation (hereinafter "MSA") promptly served notice of termination of its distributor agreement with CIT under which CIT had previously sold Catalyst batteries in the Soviet Union to V/O Medexport [C.R. 2, at 7-9]. All that remains of CIT is a narrow, windowless basement office in Mr. Gregorian's home.

After attempting unsuccessfully to resolve the disputes with the Soviet defendants and failing to obtain a retraction in *Izvestia,* plaintiffs/appellants filed suit on January 7, 1985 in district court [C.R. 141, at 3]. On April 9, 1985 plaintiffs/appellants filed a First Amended Complaint [C.R. 2]. The first twelve causes of action of the First Amended Complaint are directed against the Soviet defendants, and are condensed and summarized below:

1. *Libel:* Against defendants *Izvestia*, the U.S.S.R., V/O Medexport, V/O Licensintorg, and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2, at 19-22].

2. *Breach of Contract:* Against defendants Ministry of Foreign Trade, V/O Medexport and the U.S.S.R. [C.R. 2, at 9-11, 14-17].

3. *Detrimental Reliance:* Against the U.S.S.R., V/O Medexport and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2, at 11-12, 18].

4. *Interference with Contract:* Against *Izvestia*, U.S.S.R., and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2, at 12-13].

5. *Interference with Prospective Business Advantage:* Against *Izvestia,* U.S.S.R., and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2, at 13-14].

6. *Goods Sold and Delivered:* Against V/O Medexport, U.S.S.R., and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2, at 17-18].

7. *Intentional Infliction of Emotion Distress:* Against *Izvestia,* V/O Medexport, V/O Licensintorg, U.S.S.R., and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2, at 22-23].

8. *Punitive Damages:* Against *Izvestia*, V/O Medexport, V/O Licensintorg, U.S.S.R., and the Ministry of Foreign Trade of the U.S.S.R. [C.R. 2, at 23].

The only additional original claim for relief directed against the Soviet defendants and not listed above was the fourteenth claim for relief sounding in conspiracy. Plaintiffs/appellants dismissed that claim as against the Soviet defendants in or about August 1985 [C.R. 29].

In the same First Amended Complaint plaintiffs/appellants sued Catalyst, MSA and two employees of Catalyst for damages stemming, *inter alia,* from their breach of agreements with CIT and Gregorian.

The Soviet defendants ignored the suit and by August 13, 1985 their default had been entered [C.R. 25; C.R. 28].

On October 7, 1985 plaintiffs/appellants achieved a Rule 54(b) certification to proceed to judgment against the Soviet defendants [C.R. 36; Reporter's Transcript of Proceedings, October 7, 1985, at 4]. That, in turn, led to a default judgment in favor of plaintiffs/appellants on the four contract claims and the one libel claim against the five named Soviet defendants. The district court, having found the requisite commercial activity for both the libel and contract claims, [C.R. 22], ruled that jurisdiction existed under 28 U.S.C. § 1605(a)(2) and that a satisfactory degree of evidence existed under 28 U.S.C. § 1608(e) to support the award on the contract claims and the libel claim. The district court awarded damages totalling $413,165.17 which break down as follows: on the contract claims damages in the amount of $163,165.17, and general damages on the libel claim in the amount of $250,000 [C.R. 36; C.R. 44; C.R. 45].

Only after plaintiffs levied upon property of the Soviet defendants, two of the five Soviet defendants (V/O Medexport and V/O Licensintorg) came to court on November 28, 1986 in an attempt to overturn the judgment entered for plaintiffs [C.R. 60; C.R. 141 at 4-5]. *By that time, almost two years had elapsed since plaintiffs filed their complaint. Izvestia*, the U.S.S.R. and the Ministry of Foreign Trade of the U.S.S.R. have never made any appearance in the action.

On December 5, 1986 the State Department, through the Justice Department, filed its "Statement of Interest of the United States" *supporting the Soviets*, [C.R. 71]. However, it was apparent that no interest of justice was advanced in their support of the Soviets; the sole interest advanced was politics.

On April 5, 1987 the district court ruled on the Soviets' motion: it upheld the default judgment on the contract claims but, as requested by the State Department, it reversed its prior finding of subject matter jurisdiction on the libel claim and overturned the judgment [C.R. 141, at 34]. In so doing, the district court found its previous judgment as to libel to be lacking for subject matter jurisdiction under 28 U.S.C. § 1605, set it aside as void pursuant to Fed. R. Civ. P. 60(b)(4), and dismissed the libel claim pursuant to Fed. R. Civ. P. 12(b)(1) [C.R. 141, at 19]. Thereafter, V/O Medexport filed a notice of appeal from the district court's ruling on the contract claims [C.R. 143], but V/O Licensintorg has elected not to appear in the appeal. Plaintiffs/appellants filed a notice of appeal from the district court's ruling on the libel claim [C.R. 182].

A further detailed chronology of the procedural history of this case is set forth in C.R. 86, Declaration of Gerald L. Kroll.

SUMMARY OF ARGUMENT

Appellants' arguments can be summarized as follows:

1. The "commercial activities" exception to sovereign immunity found in 28 U.S.C. § 1605(a)(2) is clearly satisfied in this case. In its July 17, 1985 ruling [C.R. 22] the district court found that the Soviet defendants were amenable to jurisdiction under each of the "commercial activity" clauses of 1605(a)(2). The district court has never overturned its findings of commercial activity.

2. Since commercial activity has been established under § 1605(a)(2), the district court erroneously applied the exceptions to the *non*-commercial tort exception to sovereign immunity.

3. The Foreign Sovereign Immunities Act of 1976 was not adopted to be consistent with *domestic* law, but rather to conform to contemporary norms of *international* law.

4. The district court engaged in judicial legislation by refusing to follow the language of the Foreign Sovereign Immunities Act of 1976 and by erroneously holding that Congress intended to confer immunity on foreign sovereigns to the same extent that the United States government is immune under the Federal Tort Claims Act. Although the Foreign Sovereign Immunities act plainly states that *all* commercial activities which meet the standards of 28 U.S.C. § 1605(a)(2) are exempt from sovereign immunity, the district court effectively re-wrote the section by erroneously *adding* a requirement that the United States government not be entitled to immunity from similar suit.

5. Even assuming, *arguendo,* that the non-commercial tort exception applies to commercial torts, trade libel is an action distinct from defamation and, therefore, does

not fall within the scope of the libel exception to the non-commercial tort exception to sovereign immunity.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN VACATING THE DEFAULT JUDGMENT ON THE LIBEL CLAIM, SINCE THE FOREIGN SOVEREIGN IMMUNITIES ACT AND ITS LEGISLATIVE HISTORY MAKE IT CLEAR THAT COMMERCIAL TORTS ARE COVERED BY THE COMMERCIAL ACTIVITIES EXCEPTION TO SOVEREIGN IMMUNITY.

A. The Foreign Sovereign Immunities Act Was An Attempt To Codify The "Restrictive Theory Of Sovereign Immunity", Whereby States Cannot Claim Immunity For Their Commercial Activities.

The Foreign Sovereign Immunities Act of 1976 ("FSIA") was an attempt to codify the "restrictive theory of sovereign immunity", whereby states cannot claim immunity for their commercial activities. Until 1952, the United States adhered to the "absolute theory" of sovereign immunity, as set forth by Chief Justice John Marshall in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). Under the absolute theory, sovereign states are always immune from the jurisdiction of foreign states.

This absolute view was the norm in the international community until about 1900, when "a judicial practice developed in some states of denying immunity from jurisdiction to a foreign state when it was made a respondent with respect to an act of a commercial or so-called private nature." J. Sweeney, *The International Law of Sovereign*

Immunity 20 (1963). The courts that developed this restrictive theory,

> reasoned that the immunity, as it had developed in the 19th Century, was intended to apply only with respect to acts involving the sovereignty of a foreign state. They describe these acts as public acts, or political acts, or acts done *jure imperii*. The reason that the immunity was never intended to extend to litigation involving other acts, variously described as private acts, acts of a civil nature, or acts done *jure gestionis*. The courts applying the distinction between public and private acts classified commercial acts as private acts.

Id. at ii.

During the 1976 hearings on the Foreign Sovereign Immunities Act, Bruno Ristau of the Department of Justice pointed out that

> The adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication. The foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 30 (1976) [hereinafter *1976 Hearings*].

By the 1940's, the United States was out of step with contemporary international law. As a result, the State Department formally adopted the restrictive theory of sovereign immunity in the now-famous "Tate Letter" of

1952 (Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952, *reprinted in* 26 *Dept. of State Bulletin* 984 (1952) [hereinafter Tate Letter]. The Tate Letter recognized that apart from the United Kingdom, "little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunities." *Id.* In consequence, the new official State Department policy was to extend suggestions of immunity to the courts only for a sovereign's "public acts", and not for its "private", including commercial, acts.

Under the Tate Letter approach to restrictive immunity, the determination of immunity was made by the State Department, which conveyed executive "suggestions" to the court. This procedure was extremely problematic. As the United States Supreme Court has pointed out, "Sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometime including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983).

B. The Foreign Sovereign Immunities Act Sets Clear Standards For Applying The Principle of Restrictive Immunity.

Congress recognized that the State Department was not in an objective enough position to apply the commercial activities concept of restrictive immunity with an even hand. The legislative history of the Act points out that

> [If the State Department] applies the restrictive principle in a given case, it is in the awkward position

> of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6607 [hereinafter House Report]. As a result, the Foreign Sovereign Immunities Act was enacted to set forth guidelines to accomplish the goals of the restrictive theory, and sought to insure that decisions would be made "on purely legal grounds and under procedures that insured due process." *Id.* at 6604.

C. The Foreign Sovereign Immunities Act Grants Jurisdiction To Federal Courts For All Activities Which Are Commercial In Nature — Including Commercial Libel.

The F.S.I.A. is now the exclusive basis for federal court jurisdiction over suits against a foreign sovereign. *McKeel v. Islamic Republic of Iran,* 722 F.2d 582, 586-87 (9th Cir.), *cert. denied,* 469 U.S. 880 (1984). The Act states that as a general premise, foreign governments (including political subdivisions, agencies and instrumentalities, *see* 28 U.S.C. § 1603), are immune from the jurisdiction of United States courts, unless the activity complained of falls within one of the categories explicitly set out as exceptions. 28 U.S.C. § 1604. *See also Meadows v. Dominican Republic,* 817 F.2d 517, 522 (9th Cir. 1987).[1]

Section 1605(a) sets forth the general exceptions to immunity. The relevant portions of § 1605 are as follows:

---

[1]If the sovereign's actions do not fall within one of the exceptions, the courts lack both subject matter and personal jurisdiction. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488, 497 (1983).

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case —
>
> * * *
>
> (2) in which the action is based upon a *commercial activity* carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> * * *
>
> (5) *not otherwise encompassed in paragraph (2) above* [the commercial exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except *this paragraph* shall not apply to —
>
> * * *
>
> (B) Any claim arising out of malicious prosecution, abuse of process, *libel*, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605 (emphasis added).

The "commercial activities" exception of § 1605(a)(2) is the central feature of the restrictive theory of sovereign

immunity, and, consequently, of the entire F.S.I.A. *See* 28 U.S.C. § 1602.

Section 1603(d) defines "commercial activity" as "either a regular course of commercial conduct or a particular transaction or act." 28 U.S.C. § 1603(d). The section goes on to explain that "the character of an activity shall be determined by reference to the nature of the course of conduct for a particular transaction, rather than by reference to its purpose."[2]

Generally, courts have applied the commercial exception if the activity is the type that a private person would normally engage in for profit, *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985), although this is not the sole test. *See, Joseph v. Office of the Consulate General of Nigeria*, 839 F.2d 1018, —, (9th Cir. 1987) (available on WESTLAW, ALLFEDS DATABASE): "[T]here is no indication that Congress intended the presence of a profit motive on the part of the sovereign to be a threshold requirement for applying the commercial activity exception."). In determining whether a given activity is commercial, the courts have focused "only on those specific acts that form the basis of the suit. [citation] That is, the

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[2]The House Report add that "commercial activity" encompasses:

> A broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

House Report, *supra*, at 6616.

courts examine 'whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character.'" *Id.* at — (quoting *Arango v. Guzman Travel Advisor's Corp.*, 671 F.2d 1371, 1379 (5th Cir. 1980)).

The House Report explains that if the act is one that could be done by a private person, it will be considered a commercial activity. *See* House Report, *supra,* at 6615.

With this framework in mind, the district court in the case at bar, in its July 17, 1985 Order [C.R. 22] with respect to jurisdiction over the Soviet defendants, specifically found that the Soviet defendants were amenable to jurisdiction under each of the "commercial activity" clauses of § 1605(a)(2). [C.R. 22, at 2].

In determining that the Soviet defendants were amenable to jurisdiction under the "direct effects" clause of § 1605(a)(2), the district court utilized the two- part analysis set forth in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982). In *Texas Trading,* the court first found that the corporate plaintiffs had suffered a "direct" financial loss as a result of the defendants' wrongful conduct. The court then determined that the direct financial loss was incurred in the United States, because the money was to be collected in the United States and *because the plaintiffs were American corporations. Id.* at 312.

In the present case, the district court found that "[t]he two part analysis in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria* [citation], is clearly satisfied since plaintiff [sic] alleges a financial loss occurring in the United States as a result of the Soviet action which

disrupted business activities between the American companies." [C.R. 22, at 2].

The district court's finding that subject matter jurisdiction existed because the action is based upon commercial activity of the foreign state carried on in the United States by the foreign state similarly is sound, grounded upon a finding that the sale and distribution of *Izvestia* in this country constitutes a "commercial activity within the meaning of the Act." *See United Euram Corp. v. U.S.S.R.*, 461 F. Supp. 609 (S.D.N.Y. 1978).

Finally, the circulation of *Izvestia* in the United States and California by the Soviet defendants constitutes yet another libel, bringing the wrongful act within the parameters of the clause permitting subject matter jurisdiction based on an act performed in the United States in connection with a commercial activity elsewhere, because the publication, circulation and sale of the *Izvestia* edition took place outside the United States as well. *See generally Marschalk Co. v. Iran National Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981), *rev'd on other grounds*, 657 F.2d 3 (2d Cir. 1982).

1. Libel Which Constitutes or is Connected with Commercial Activity is by Definition Not Covered by Subsection 1605(a)(5).

Despite the district court's prior finding of commerciality, which it never abandoned in the April 5, 1987 Order, the district court decided to apply the libel exception to the *non-commercial* tort exceptions to sovereign immunity (*i.e.* 28 U.S.C. § 1605(a)(5)(B)). 28 U.S.C. § 1605(a)(5) is the so-called non-commercial torts exception under the F.S.I.A., which states:

> (5) [Foreign states shall not be immune in any case] *not otherwise encompassed in paragraph (2)*

> *above* [the commercial exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; *except this paragraph shall not apply to* —
>
> * * *
>
> (B) any claim arising out of malicious prosecution, abuse of process, *libel*, slander, misrepresentation, deceit, or interference with contract rights.

The non-commercial torts exception was drafted with the problem of traffic accidents in mind. *See* House Report, *supra*, at 6619, 6620; *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358, 362 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985). *See generally* Note, *The Non-Commercial Tort Exception to the Foreign Sovereign Immunities Act*, 9 Fordham Int'l L.J. 134 (1985).

Prior to the instant case, courts uniformly held, and the legislative history clearly confirms, that section 1605(a)(5) only applies to *non-commercial torts*.[3] *See* House Report, *supra*, at 6615, 6619-20; *Olsen by Sheldon*

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[3]During the 1973 hearings of an earlier, but virtually identical, version of the bill, the drafters explicitly stated that:

> This section [28 U.S.C. § 1605(a)(5)] applies *only* to torts that are not connected with the commercial activities of a foreign state. Under section 1605(2) [28 U.S.C. § 1605(a)(2)], no act of a foreign state, *tortious or not*, which is connected with commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States.

v. Government of Mexico, 729 F.2d 641, 645 (9th Cir.), *cert. denied,* 469 U.S. 917 (1984); *Yessenin-Volpin v. Novosti Press Agency,* 443 F. Supp. 849, 852 (S.D.N.Y. 1978); *United Euram v. Union of Soviet Socialist Republics,* 461 F. Supp. 609, 612 (S.D.N.Y. 1978); *Persinger v. Islamic Republic of Iran,* 729 F.2d 835 (D.C. Cir.), *cert. denied,* 469 U.S. 881 (1984).

In *Yessenin-Volpin,* 443 F. Supp. 849, the only other case involving libel under the F.S.I.A., although denying jurisdiction because the alleged libel was not "in connection with commercial activity," the court made it abundantly clear that if the libel *was* within the scope of 1605(a)(2), it would escape the bar of 1605(a)(5)(B). *Id.* at 855. The plaintiffs in *Yessenin-Volpin* had argued that the commercial exception, 1605(a)(2), should apply since the newspapers which published the libel engaged in commercial activity (they "sold articles to foreign media") *Id.* at 856. The court explained:

> [T]he plaintiff's argument in this regard seems to be based on the unstated premise that an entity which engages in commercial activity is a commercial entity and thus is not entitled to claim sovereign immunity. The Immunities Act does not embody such a principle, however. Rather, it clearly contemplates that a given entity may at some times engage in commercial activities, on which it would not be immune, and at other times take actions "whose essential nature is public or governmental," on which it would be immune . . . The relevant issue in this case . . . is not whether Novosti or TASS engage in commercial ac-

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Immunities of Foreign States: Hearing Before the Subcomm. on Claims and Governmental Relations Before the House Comm. on the Judiciary, 93rd Cong., 1st Sess., 42 (1973) (emphasis added) [hereinafter *1973 Hearings*].

> tivities but whether their alleged libels were "in connection with a commercial activity."

Id. at 855, 856.

The court concluded that the alleged libels "were official commentary of the Soviet government" which could not be "characterized either as 'a regular course of commercial conduct' or as a 'particular commercial transaction or act.' " *Id.* at 856.

The case at bar is clearly distinguishable from *Yessinin-Volpin.* Here, the district court applied the *Yessinin-Volpin* test, and determined that the libels committed by *Izvestia were in connection with particular commercial transactions:*

> Plaintiffs allege that the defamatory article in *Izvestia* resulted from Mr. Gregorian's pursuit of contract claims against the defendants. Rather than settling the contract claims, the defendants resorted to fabricating accusations against Mr. Gregorian. They then caused the accusations to be published and distributed throughout the world, including the United States.

658 F. Supp. at 1231 [C.R. 141, at 14].

In another case involving the application of sections 1605(a)(2) and 1605(a)(5), *United Euram Corp. v. U.S.S.R.,* 461 F. Supp. 609, 612 (S.D.N.Y. 1978), the court, citing *Yessinin-Volpin,* explicitly declared that "[t]he restrictions embodied in subsection (a)(5)(B) were not intended to restrict the scope of the commercial activity exception in subsection (a)(2)." *Id.* at 612. Consequently, the court permitted the plaintiff to plead interference with contract rights, a section (a) (5)(B) tort.

Thus the legislative history and overwhelming precedent clearly indicate that the district court erred in holding that, although the libels were *commercial* in nature, they were nonetheless subject to the limits of the *non-commercial* torts exception of section 1605(a)(5).

II.

THE DISTRICT COURT ENGAGED IN JUDICIAL LEGISLATION WHEN IT HELD THAT IT WAS "UNLIKELY" THAT CONGRESS MEANT WHAT IT WROTE IN F.S.I.A.

The district court was admittedly "perplexed" [C.R. 141, at 15], "puzzled", [C.R. 141, at 18], and "confused" [C.R. 141, at 11] by the "complicated, confusing, seemingly self-contradictory, and yet reasonable interpretations of the F.S.I.A." [C.R. 141, at 11] The district court continued on from there to decide that it was "unlikely that Congress wished to create a double standard under which foreign sovereigns could be sued in United States courts on tort claims, such as libel, for which the United States government itself is immune." [C.R. 141, at 19].

The court apparently believed that *"because of"* what it termed the "jumbled draftsmanship of section 1605(a)" [C.R. 141, at 19 (emphasis added)], Congress, by "tracking the language of section 2680(h) of the F.T.C.A. in section 1605(a)(5)(B) of the F.S.I.A., *intended* that foreign sovereigns remain immune from libel and other claims to the same extent that the United States is immune under the F.T.C.A." [C.R. 141, at 19 (emphasis added)].

However, in appellants' view, *there is no support for such a restrictive reading of the statute.* Simply put, *there is nothing confusing about the Act.* The Act plainly states

that *all* commercial activities which meet the standards of 1605(a)(2) are exempt from sovereign immunity.

A. Congress Intended the F.S.I.A. to Codify the Restrictive Theory of Sovereign Immunity as Recognized Under International Law — not Domestic Law.

While the phrasing of section 1605(a)(5)(B) is virtually identical to section 2680(h) of the Federal Tort Claims Act (F.T.C.A.), 28 U.S.C. § 2680(h),[4] there are fundamental differences between the two acts. Nonetheless, the district court was impressed with the similarities between the two acts, since "the F.T.C.A. is a codification of the principle of restrictive immunity with regard to the

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[4] 28 U.S.C. § 2680(h):

> [The provisions of this chapter shall not apply to] Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, interference with contract rights.

It should be noted that there is very little discussion of the (a)(5)(B) exceptions to the non-commercial tort exception in the legislative history, so their purpose is unclear. Indeed, the exceptions were not even included in the 1973 version of the bill, and appear to have been added as an afterthought. The 1973 version of section (a)(5) read:

> [A foreign state shall not be immune in any case] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, caused by the negligent or wrongful act or omission in the United States of that foreign state or any official or employee thereof except that a foreign state shall be immune in any case under this paragraph in which a remedy is available under Article VIII of the Agreement Between the Parties of the North Atlantic Treaty Regarding the Status of Their Forces.

1973 Hearings, supra, at 5-6.

U.S. government on a domestic level . . . [and section 2680(h)] does not create any ambiguous connections to other code sections. . . ." [C.R. 141, at 18].

The court's analogy falls short: the legislative history lends absolutely no support to such a holding, in that the Act's express purpose was to codify the "restrictive principle . . . as presently recognized in *international law*" — not *domestic law*. House Report, *supra*, at 6605 (emphasis added).[5] No foreign country which adheres to the restrictive principle provides immunity for activities arising out of libel or slander. *See generally* U.N. Office of Legal Affairs, U.N. Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property*, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982) [hereinafter *U.N. Materials*].

The 1976 hearings on the F.S.I.A. make it clear that the Act is, in particular, designed to be consistent with the *European Convention on State Immunity and Additional Protocol*, 1972, *Council of Europe*, No. 74 (*reprinted in U.N. Materials, supra*, at 156-72), which has absolutely no corresponding exemption for libel claims. For example, the Canadian State Immunity Act of 1981 (*reprinted in U.N. Materials, supra*, at 7), which closely parallels the F.S.I.A., including the utilization of the "nature" test as opposed to the "purpose" test, does not have any limits on tort claims corresponding to section 1605(a)(5)(B). It appears that, in spite of the stated purpose of the Act, the granting of immunity for activities arising out of libel or slander of a commercial nature would set the United

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[5]The court is correct insofar as the F.T.C.A. "restricts" the sovereign immunity of the U. S. government, but those restrictions have little in common with the principles and concerns enunicated in the Tate Letter. Indeed, the Tate Letter was written six years *after* the F.T.C.A. was finally enacted.

States at odds with the current principles of restrictive immunity under international law.

B. Congress Intended to Grant Less Immunity to Foreign Sovereigns than It Does to the United States Government.

The district court correctly recognized the existence of a "double standard" in the application of the theory of sovereign immunity to the United States and foreign sovereigns, as it is clear that Congress intended to grant less immunity to foreign sovereigns than it does to the United States government.

As the district court itself pointed out, the F.T.C.A. sections do "not create any ambiguous connections to other code sections that expose the government to suit." [C.R. 141, at 18]. In fact, *the F.T.C.A. has no corresponding commercial activity exception at all.* The significance of this fact did not surface in the district court's decision — as underscored by the court's comment that "United States courts have consistently barred claims of libel against the United States government, no matter how pleaded . . . even libel claims of a clear commercial nature are barred." [C.R. 141, at 19 (citing *Art Metal-U.S.A., Inc. v. United States,* 753 F.2d 1151, 1156 (D.C. Cir. 1985); *Hoesl v. United States,* 451 F. Supp. 1170, 1178-80 (N.D. Cal. 1978), *aff'd,* 629 F.2d 586 (9th Cir. 1980); *Bosco v. U.S. Army Corps of Engineers, Ft. Worth District,* 611 F. Supp. 449, 452-453 (S.D. Tex. 1985))]. Therefore, although commercial libel claims may arguably be barred under the F.T.C.A., Congress did not intend that the exact same standards apply to F.S.I.A. analysis, by virtue of their inclusion of the commercial activities exception, which is not in the F.T.C.A. It therefore appears that by creating the commercial exception, and necessarily adopt-

ing the Tate Letter's restrictive principles, Congress *intended* to deny immunity to foreign sovereigns in an area where the U.S. government itself remained immune — commercial activity.

III.

COMMERCIAL LIBEL, OR "TRADE LIBEL", IS AN ACTION DISTINCT FROM DEFAMATION, AND SHOULD THEREFORE NOT BE BARRED UNDER THE 1605(a)(5)(B) LIBEL AND SLANDER EXCEPTIONS.

28 U.S.C. § 1603 provides for a determination of the "commercial character of an activity . . . by reference to the *nature* of the course of conduct or particular transaction or act. . . ." *Id.* Assuming, *arguendo,* that the district court was correct in holding that § 1605(a)(5)(B) of the F.S.I.A. bars *defamation* claims, even those *connected with* commercial activity, it nonetheless erred in exploring the nature of the alleged libels.[6]

The harm committed by the Soviet defendants against Gregorian and CIT, as set forth in the tenth claim for relief in the first amended complaint [C.R. 2, at 19], constituted, at least in part, a *trade libel,* which is an action distinct from defamation. *See Matter of Kasler,* 611 F.2d 308, 311 (9th Cir. 1979) ("In California these two torts [libel and trade libel] are considered distinct."); *Roemer v. Commissioner of Internal Revenue Service,* 716

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[6]"Commercial activity" as used in § 1605(a)(2) is defined in § 1603(d) by reference to the "*nature* of the . . . particular *transaction or act.*" It is obvious, therefore, that if the libel printed in *Izvestia* itself was of a "commercial nature", then it would fall within the definition of commercial activity, even if the "purpose" of the libel was non-commercial.

F.2d 693, 699 (9th Cir. 1983) ("California law . . . provides for related torts of disparagement or trade libel that will remedy an attack on the quality of the plaintiff's products or services."); *Shores v. Chip Steak Company,* 130 Cal. App. 2d 627, 630, 279 P.2d 595, 597 (1955) (Trade libel is concerned with the disparagement of goods and services, whereas libel concerns the person or reputation of the plaintiff); *Erlich v. Etner,* 225 Cal. App. 2d 69, 73, 36 Cal.Rptr. 256 (1964); *Restatement (Second) of Torts* §§ 624, 626 (1977).

A. Trade Libel is, by Its Nature, a Distinctly Commercial Tort.

"Trade libel" is a misnomer which goes by a variety of other names, including "disparagement", "disparagement of quality", "disparagement of goods", "commercial libel", "slander of goods", "corporate defamation", and "trade disparagement", to name a few. It is a misnomer because it is really not a "libel" at all — in fact, it need not even be written. *Restatement (Second) of Torts* § 626, comment a (1977).

Dean Prosser termed the tort "injurious falsehood" in an attempt to emphasize the historical distinction between "libel" and "trade libel." *See* Prosser, *Injurious Falsehood: The Basis of Liability,* 59 Colum. L. Rev. 425, 428 (1959) ("[T]he complex with which we are dealing is to be classified as one form of intentional interference with economic relations, and not as a branch of the special and strict liability for more general harm to personal reputation involved in libel or slander."). *See also* Prosser and Keeton, *The Law of Torts* § 128 (5th ed. 1985); *Restatement (Second) of Torts* §§ 624, 626 (1977).

Trade libel is a *"distinctly commercial tort". Acoustical Manufacturing Co. v. Audio Times, Inc.,* 3 Med. L. Rep.

2057 (D.C. Super. 1977). *See also Roemer v. Commissioner of Internal Revenue Service,* 716 F.2d 693, 699 (9th Cir. 1983). Moreover, as a *business tort* it falls within the scope of section 1605(a)(2). House Report, *supra,* at 6615 (emphasis added) ("The definition [of commercial activity under section 1603] *includes . . . business torts* occurring in the United States.").

B. Trade Libel is Not Barred Under 28 U.S.C. § 1605(a)(5)(B).

The purely commercial "nature" of trade libel means that, by definition, the tort falls under section 1605(a)(2), not 1605(a)(5). Furthermore, since trade libel, or "disparagement", is an action distinct from defamation, the libel exception to section 1605(a)(5) is wholly irrelevant.

The district court, analogizing to the parallel F.T.C.A. sections, claimed that "United States courts have consistently barred claims of libel against the United States government no matter how pleaded." [C.R. 141, at 19]. In support of its analogy, the court cited to *Art Metal-U.S.A., Inc. v. United States,* 753 F.2d 1151, 1156 (D.C. Cir. 1985). In *Art Metal,* the U.S. Court of Appeals for the D.C. Circuit held that a claim of injurious falsehood was barred under the Federal Torts Claim Act as a claim arising out of libel or slander. *Id.* However, in a footnote to its discussion, the court stated:

> We realize that distinctions exist between injurious falsehood and defamation. We also acknowledge that *in some contexts* those distinctions may be relevant. In this case we hold only that the distinctions are inapposite in determining whether injurious falsehood, trade libel, slander of goods, or disparagement

> of property are claims arising out of libel or slander *under the F.T.C.A.*

Id. at 1156 n.8 (emphasis added).

In determining the nature of a claim under the F.S.I.A., the distinction is ***highly relevant***: the F.T.C.A. has no corresponding commercial activities exception, whereas the existence/non-existence of commercial activity is a pivotal factor under the F.S.I.A.

In *Falcoal, Inc. v. Turkiye Komur Isletmeri Kumur,* 660 F. Supp. 1536 (S.D. Tex. 1987), a Texas coal company sued a Turkish governmental entity under the F.S.I.A. for, among other things, "injury to business reputation" — *i.e.* trade libel. Significantly, the court found that "subject matter jurisdiction exists," although the court ultimately dismissed the action for lack of *in personam* jurisdiction. *Id.* at 1543. By finding that subject matter jurisdiction existed, the *Falcoal* court implicitly recognized that the business tort of trade libel constituted commercial activity within the meaning of section 1605(a)(2).

Similarly, plaintiffs/appellants herein have alleged the business tort of trade libel in their tenth claim for relief. Based upon the arguments and authorities presented hereinabove, plaintiffs/appellants respectfully submit that the legislative intent to include this variety of business tort under the commercial activity exception to the F.S.I.A. should be given full force and effect.

CONCLUSION

For all the foregoing reasons, the April 5, 1987 Order of the United States District Court, Central District of California, setting aside the default judgment as to libel and dismissing the libel claim should be reversed.

DATED: March 4, 1988

Respectfully submitted,
KROLL & FIRESTONE

By: GERALD L. KROLL
Attorneys for Appellants
Raphael Gregorian and California
International Trade Corporation

STATEMENT OF RELATED CASES REQUIRED BY NINTH CIRCUIT COURT OF APPEALS RULE 13(b) (4) (B)

There is no related case pending in the Ninth Circuit. However, in or about December 1986 *Izvestia* filed and is pursuing an action for defamation against Plaintiff/appellant Raphael Gregorian in Moscow City Court, Moscow, U.S.S.R.

DATED: March 4, 1988

KROLL & FIRESTONE

BY: GERALD L. KROLL
Attorneys for Appellants
Raphael Gregorian and California International Trade Corporation

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 4, 1988, I served the within Appellants' Opening Brief in re: "Raphael Gregorian v. Izvestia" in the Court of Appeal for the Ninth Circuit Nos. CA 88-5562 and CV 85-0100-KN on the parties in said action, by placing two copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Martin Popper
WOLF, POPPER, ROSS,
WOLF & JONES,
845 Third Avenue
New York, N.Y. 10022

Douglas Letter
Civil Division
Appellate Staff
Rm. 3617
U.S. Department of Justice
10th Street and Pennsylvania
Avenue, Northwest
Washington, D.C. 20530

Michael McDonald
Washington Legal
Foundation
Washington, D.C. 20036

William Pearl
2721 Second Street, #210
Santa Monica, CA 90405

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 4, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Court of Appeals
Docket Nos. CA-87-5903; CA-88-5562

GREGORIAN *et al.*

vs.

IZVESTIA *et al.*

CERTIFICATE REQUIRED BY CIRCUIT RULE 28-2.1

The undersigned, counsel of record for appellant V/O Medexport and cross-appellees V/O Medexport and V/O Licensintorg certifies that there are no known interested non-governmental parties other than those who have participated in the case.

WOLF POPPER ROSS WOLF & JONES

BY: MARTIN POPPER

Dated: April 20, 1988

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Court of Appeals
Docket Nos. CA-87-5903; CA-88-5562
District Court Docket No. CV85-0100-KN

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAPHAEL GREGORIAN AND CALIFORNIA INTERNATIONAL TRADE CORPORATION,
Plaintiffs/Appellees/Cross-Appellants,

vs.

IZVESTIA; MINISTRY OF FOREIGN TRADE OF THE UNION OF SOVIET SOCIALIST REPUBLICS; UNION OF SOVIET SOCIALIST REPUBLICS,
Defendants

and

V/O MEDEXPORT
Defendant/Appellant/Cross-Appellee

and

V/O LICENSINTORG
Defendant/Cross-Appellee

APPEAL FROM THE APRIL 5, 1988 ORDER
OF THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPENING BRIEF ON BEHALF OF APPELLANT V/O MEDEXPORT

STATEMENT OF JURISDICTION

I.
NO SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT

Appellant V/O Medexport is an agency of the Union of Soviet Socialist Republics and therefore is immune from the jurisdiction of the courts of the United States. 28 U.S.C. §§ 1603 and 1604. No statutory exceptions to immunity under 28 U.S.C. § 1605 apply on the record in this case.

II.
THIS COURT HAS JURISDICTION OF THE APPEAL PURSUANT TO THE COLLATERAL ORDER DOCTRINE

The jurisdiction of the Court is invoked under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). V/O Medexport appeals from an order denying its claim to immunity under 28 U.S.C. § 1604. An order denying a claim of immunity under 28 U.S.C. § 1604 is collateral and immediately appealable. *Segni* v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987).

A. No Final Order

The subject of this appeal is an order of the district court of April 5, 1987 denying, in relevant part, V/O Medexport's motion to vacate a default judgment. The order did not finally dispose of all claims with respect to all parties.[1] A subsequent order of December 18, 1987 directed entry of judgment pursuant to Fed.R.Civ. P. 54(b) only as to a different part of the April 5, 1987 order (the part that is the subject of the cross-appeal, No. 88-5562) [CR 180]. The underlying default judgment, which did not finally dispose of all claims with respect to all parties, has never been properly certified as final pursuant to Fed.R.Civ. P. 54(b).[2]

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1 Among the numerous related claims not yet the subject of any final order are those set out and described *infra* at p. 38.

2 The district court, on October 7, 1985, found liability as to the claims here at issue "tentatively," but did not enter damages. It also then simultaneously certified as "final" its "tentative" finding of liability [Transcript of October 7, 1985]. Damages were subsequently entered in July, 1986, but no Rule 54(b) certification was made [CR 44, 45]. There is therefore no final judgment." *United States* v. *Burnett*, 262 F.2d 55 (9th Cir. 1959). It is at least plausible that in an action under the Foreign Sovereign Immunities Act, the special order required as a precedent to execution under 28 U.S.C. § 1610(c) is a "final decision" within the meaning of 28 U.S.C. § 1291. Only a judgment that awards execution is "final." *St. Louis, Iron Mountain & Southern R. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28 (1883). Here, however, plaintiffs went to United States Magistrate Geffen to obtain the § 1610(c) order [CR 54]. Such duty had never been referred to the Magistrate by the district court, and there was of course no consent by defendants. Absent reference or consent,

B. The Appeal Is Timely

V/O Medexport timely filed its notice of appeal from the April 5, 1987 order of the district court on April 30, 1987. Fed. R. App. P. 4(a)(1).

STATEMENT OF ISSUES PRESENTED

I. Whether after the foreign state defendant had made a prima facie case that no exception to immunity applied and plaintiff failed to go forward with the evidence, the district court erred in failing to accord the defendant a presumption of immunity and to dismiss the claim.

II. Whether the district court erred in finding "direct effect" jurisdiction under the Foreign Sovereign Immunities Act on an allegation of breach of oral contract inside the Soviet Union, in the total absence of any competent evidence of act or direct injury in the United States.

III. Whether the district court erred in applying the "doing business" test to find jurisdiction under the Foreign Sovereign Immunities Act; and in particular by basing jurisdiction on the diplomatic and consular presence of the Soviet Union and ignoring the separate juridical existence of the defendant.

IV. Whether on a timely motion to set aside a default, when the defendant had a meritorious defense, and when the defendant appeared at the urging of the United States, the district court erred in refusing to set aside the default solely on the grounds that the conduct of the defendant's sovereign, the Soviet Union, was "culpable".

STATEMENT OF THE CASE

I.
NATURE OF THE CASE

V/O Medexport appeals from an order of the district court denying its motion to vacate a default judgment pursuant to

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Magistrate has no authority to enter a "final decision" in a civil case. *Alamo v. California Processors, Inc.*, 690 F.2d 717 (9th Cir. 1982).

Fed.R.Civ. P. 60(b)(4) (judgment void for lack of both subject matter and personal jurisdiction) and 60(b)(6) (other reasons justifying relief).

Plaintiffs Gregorian and California International Trade Corporation ("Gregorian") conducted a business as international brokers of medical equipment from an office in Moscow [CR 31, pp. 16-17]. In the period November 1982-June 1984 three sets of medical equipment were shipped to California International Trade Corporation ("CIT") in the Soviet Union on "consignment" and for display at exhibitions [CR 31, pp. 86, 91, 93, 141-3]. CIT was subsequently unable to obtain written contracts to sell the equipment in the USSR [CR 33, Brown Affidavit at ¶ 6]. After Gregorian was stripped of accreditation to maintain the business in the Soviet Union by reason of charges of criminal misconduct, he sued in the Central District of California claiming (for the first time) that V/O Medexport had "promised" to pay for the three sets of unsold equipment [CR 2, ¶¶ 47-63]. V/O Medexport is a foreign trade organization of the Union of Soviet Socialist Republics ("USSR"). It functions as a broker in import and export transactions and is an "agency" of the Soviet Union within the meaning of 28 U.S.C. § 1603(b) (*i.e.* a "separate legal person" owned by a foreign state). V/O Medexport did not at first appear and a default judgment (as to, *inter alia*, the medical equipment) was entered against it [CR 44]. At the urging of the State Department, V/O Medexport appeared to move to set aside the default judgment [CR74]. The district court, as to the "oral contract" medical equipment claims, refused to set aside the default judgment by Order filed April 5, 1987 [CR 141], and this appeal followed.

II.
THE COURSE OF PROCEEDINGS

On January 7, 1985 plaintiffs filed this action in the Central District of California. On April 9, 1985 a First Amended Complaint ("complaint") was filed. The complaint asserted seventeen "claims for relief" against nine defendants [CR 2]. Among

the defendants were appellant V/O Medexport, V/O Licensintorg, the USSR, its Ministry of Foreign Trade, and the newspaper Izvestia (organ of the Supreme Soviet of the USSR) (collectively "the foreign state defendants"). The fifth through eighth claims asserted breach of oral contract against V/O Medexport, the USSR and its Ministry of Foreign Trade in regard to the medical equipment at issue, and are the subject of this appeal [CR 2, pp. 14-18].

On May 10, 1985 the district court issued letters rogatory to achieve service on the foreign state defendants, and ordered that answers to the complaint were due within 60 days of service [CR 5]. Proof of service (filed on June 25, 1985) claimed service on the foreign state defendants on May 31, 1985 [CR 15].

Not waiting until answers of the foreign state defendants were due, and in their absence, the district court ruled on July 17, 1985 that "the Soviet defendants are subject to the jurisdiction of this Court" and therefore the district court had "subject matter jurisdiction under 28 U.S.C. § 1330(a)" of the entire action [CR 22]. No findings of fact were made.

In September 1985, after the district court had found subject matter jurisdiction, the plaintiffs for the first time submitted affidavits and documents in regard to the medical equipment claims and moved for entry of default judgment [CR 31, 32, 33]. No writing evidencing a contractual agreement was then (or thereafter) submitted.

On October 1, 1985 a letter from the United States Department of State was filed, and the district court was informed that the USSR had rejected the letters rogatory and asserted its sovereign immunity on its own behalf and on the behalf of its organs and agencies [CR 35].

On October 7, 1985 the district court orally announced the "tentative decision" that, as to the claims at issue on this appeal, "the defendants USSR, V/O Medexport, and Ministry of Foreign Trade wrongfully failed to pay for equipment they received and used, in breach of a contractual obligation to pay." The

district court did not state what evidence had led it to the "tentative decision," and made no findings of fact. Entry of judgment was "reserved" pending a future ascertainment of "the amount of damages to be awarded." Nonetheless, the district court also simultaneously found that, as to its "tentative decision," "under Rule 54(b) of the Federal Rules of Civil Procedure, there is no just reason for delaying the entry of judgment against the Soviet defendants until the liability of the remaining defendants is adjudicated." [Transcript of October 7, 1985]

On July 8, 1986 the district court ordered the entry of default judgment as to the medical equipment claims in the amount of $163,165.17, but made no Rule 54(b) certification [CR 44, 45]. The district court on July 29, 1986 ordered the issue of letters rogatory to serve the default judgment upon, *inter alia*, V/O Medexport [CR 46].[3]

The United States through the representatives of the State Department commenced on September 29, 1986 a series of meetings "with Soviet officials" to encourage participation in this case

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3 Plaintiffs moved on September 29, 1986, before Magistrate Geffen of the Central District of California for the right to execute upon the default judgment [CR 49] No reference of such duty to the magistrate had been made by the district court. Magistrate Geffen on October 14, 1986 found that a "reasonable time" had elapsed (as required by 28 U.S.C. § 1610(c)) since the giving of notice of the default judgment on September 16, 1986, and ordered that plaintiffs had the right to attach in aid of execution on the judgment [CR 54] Plaintiffs returned to Magistrate Geffen on November 18, 1986 with an ex parte application and proposed order to attach "certain bank accounts located in the United States held under the name of the BANK FOR FOREIGN TRADE, U.S.S.R., for the benefit of V/O Medexport" [CR 58] Magistrate Geffen immediately signed plaintiffs' proposed order, which was filed November 20, 1986 [CR 59]

On November 21, 1986 plaintiffs' counsel obtained a writ of execution from the Clerk of the United States District Court for the Southern District of New York based on Magistrate Geffen's order of November 20, 1986. When BankAmerica refused to turn over Bank for Foreign Trade's funds, plaintiffs moved by order to show cause on December 4, 1986 to hold BankAmerica in civil contempt [CR 65] On February 2, 1987 the district court found BankAmerica not in contempt and vacated the writ of execution wrongfully obtained by plaintiffs on November 21, 1986 [CR 122, 123] On April 24, 1987 the district court imposed sanctions on Kroll & Lindstrom (plaintiffs' counsel) for their misconduct [CR 146]

"within the United States' legal system" [CR 74]. On October 16, 1986, by diplomatic note, the USSR advised the State Department that a study was being conducted of all aspects of this litigation [*Id.*]. On November 17, 1986 the Soviet Embassy advised the Legal Adviser to the State Department that V/O Medexport would appear [*Id.*]. On November 18, 1986 the Legal Adviser informed the district court (and plaintiffs' counsel) by letter that V/O Medexport would appear and that the United States would support appropriate motions to reopen the case so that all relevant arguments could be heard [*Id.*].[4] On November 21, 1986 V/O Medexport filed a notice of appearance in the district court [CR 60].

On December 4, 1986 V/O Medexport moved to set aside the default judgment on the medical equipment claims [CR 78]. The grounds for the motion were "lack of subject matter and personal jurisdiction" (Fed.R.Civ. P. 60(b)(4)) [*Id.* at p.2] and that "the compelling public interest in determining internationally sensitive areas of the domestic law of the United States in accordance with international law and only after full hearing" required relief. (Fed.R.Civ. P. 60(b)(6)) [*Id.*]. On December 5, 1986 the United States filed a Statement of Interest supporting V/O Medexport's motion for relief under Rule 60(b)(6) [CR 71].

The district court heard argument on the motion on January 28, 1987. Counsel for V/O Medexport explicitly argued, *inter alia*, that there was no "nexus" between the United States and the plaintiffs' claimed grievance concerning its business in the Soviet Union sufficient to give the district court jurisdiction as to the medical equipment claims under the Foreign Sovereign Immunities Act. [Transcript of 1/28/86 at pp. 15-16]

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4 The letter of the Legal Adviser to the State Department was returned "for non-compliance with local rules" [CR 74, p.7]

5 This is of special note only because the district court in the order and opinion of April 5, 1986 appealed from, makes the absolutely incorrect statement that "defendants' counsel conceded the applicability of subject matter jurisdiction under the FSIA to plaintiffs' contract claims at a hearing before this court on January 28, 1986." 658 F.Supp. at 1229, 1238. No such "concession" was made. Indeed, counsel argued that there was no jurisdiction under the FSIA.

On April 5, 1987 the district court denied V/O Medexport's motion to vacate the default judgment as to the medical equipment claims [CR 141] in an opinion and order reported at 658 F.Supp. 1224. On April 30, 1987 V/O Medexport filed its notice of appeal [CR 143].[6]

III.
FACTS

A. No Findings of Fact by the District Court

The district court never made any findings of fact concerning the medical equipment ("'contract'") claims. No part of the record relating to the "contract" claims was ever referred to in any opinion or order of the district court.

B. Pleadings

As they relate to the "contract" claims, the Amended Complaint is extremely brief and consists of thirteen relevant paragraphs [CR 2, ¶¶ 48-51, 53-6, 58-61, 63]. In summary, as to each of three sets of medical technology, Gregorian alleges that "V/O Medexport" entered into an agreement with CIT by promising to pay a certain sum for the equipment. No person is identified as the "promisor", no place is identified as where the "promise" was purportedly made. No details as to how payment was purportedly to be made are alleged. Gregorian alleges that as to two pieces of equipment (Fifth and Sixth Claims,

6 In Gregorian's opening brief in the cross-appeal as to the "libel" claims (No. 88-5562), appears the incomprehensible statement that "V/O Medexport filed a notice of appeal from the district court's ruling on the contract claims [CR 143], but V/O Licensintorg has elected not to appear in the appeal." Opening Brief on Behalf of Appellants (No. 88-5562), p.8. V/O Licensintorg is not a defendant on the medical equipment ("contract") claims. No judgment as to those claims was ever entered against it. V/O Licensintorg has no Article III standing to "elect" to appeal from a default judgment not entered against it. The USSR and its Ministry of Foreign Trade were named as defendants on Gregorian's medical equipment claims, and default judgments were entered against them. They did not appear in the district court and do not appear in this Court.

"Technicon" and "Mennen" equipment). CIT shipped and delivered the equipment to V/O Medexport in the Soviet Union. The place from which the equipment was shipped is unidentified. As to the third piece of equipment (Seventh claim, "Sarns" equipment), the Amended Complaint states that the equipment was present in the Soviet Union at the time the purported "promise" was made.

C. Record

On July 17, 1985, when the district court found subject matter jurisdiction, there was nothing in the record beyond the pleadings concerning the "contract" claims. On April 5, 1987, when the district court denied V/O Medexport's Rule 60 motion, various materials had been filed by the parties with reference to the "contract" claims. Of the materials filed by Gregorian, some few authentically date from before his commencement of this litigation on January 7, 1985. Of the mass of unsworn post-litigation statements filed by Gregorian, one escapes the rigid evidentiary bar against the admission of unsworn, self-interested, litigation-generated, hearsay by coming within the scope of Federal Rule of Evidence 801(d)(2) (Admission by party-opponent) [CR 31, pp. 23-24, Exhibit 9, discussed *infra*]. Finally, the affidavits and declarations filed by Gregorian and the testimony given under penalty of perjury of Gregorian's employees filed by V/O Medexport are in agreement in certain (limited) areas. From these sections of the record alone, the following statement of uncontested facts as to the medical equipment at issue is drawn.

D. Uncontested Facts

1. "Technicon" Equipment (Fifth Claim for Relief)

The "Technicon" equipment was shipped from Vienna, Austria via Amsterdam, Netherlands, to the CIT stand at the Electromash-82 trade fair, Krasnia Presnia Fairgrounds, Moscow in November, 1982 [CR 31, p. 86; Exhibit 35]. CIT received the equipment from Technicon on consignment [CR 32, Gregorian

Affidavit at ¶ 67]. By check drawn November 30, 1983, CIT paid Technicon in Vienna, Austria the sum of $65,568.49 for the equipment [CR 31, p. 88; Exhibit 37]. On December 20, 1984, in a telex sent by CIT's Moscow office to V/O Medexport's Moscow office (incidentally, the *only* document in the record reflecting a communication between plaintiffs and defendant prior to the commencement of the litigation), plaintiffs stated as follows:

> Attn: Mr. V.A. Gritsanenko
>
> This will confirm California International Trade Agreement to sell technicon model ra-1000 analyzer at usd 50,000 net cif Moscow, with following stipulations:
>
> a) contract must be signed no later than December 21, 1984
> b) payment must be remitted by cable within 10 days
>
> Regards
> Diane Brown
> Vice President
> California International Trade

[CR 31, p. 153; Exhibit 51]

The conditions specified in the intra-Moscow telex of December 20, 1984 were not met, and no contract for the "Technicon" equipment was "completed" [CR 33, Affidavit of Diane Brown, Vice-President of CIT, at ¶¶ 4-6]. The "Technicon" equipment was present in the Soviet Union on "consignment" [Id., at ¶ 5], and as plaintiffs were unable to complete a contract for its sale, they repossessed it and returned it from the Soviet Union to Austria in the spring of 1985 [CR 103, pp. 25 and 34, testimony of CIT employees Youri Evguenievich Gorsky and Siddhartha Bose; CR 32, affidavit of Raphael Gregorian at ¶ 72].

2. "Mennen" Equipment (Sixth Claim for Relief)

There is no pre-litigation document in the record that would show when or how this equipment arrived in the Soviet Union. On June 4, 1984 "Hospital No. 57" took delivery of some part of

this equipment from Mr. Gorsky of CIT "for the purpose of testing" [CR 31, pp. 91 and 93, Exhibit 39; CR 103, p. 25]. The space on the form [CR 31, p. 91] for reference to a contract is blank. No pre-litigation document shows any connection between V/O Medexport and this equipment. The affidavit of Diane Brown filed by Gregorian states that this equipment (as well as the other equipment at issue) was in the Soviet Union on "consignment" and that CIT was unable to "complete" a contract for its sale [CR 33, Affidavit of Diane Brown at ¶¶ 5 and 6].

3. "Sarns" Equipment (Seventh Claim for Relief)

The "Sarns" equipment was shipped on consignment by invoice dated June 18, 1984 to "V/O Expocenter - CIT Stand, 'Biochemie-84' Exhibition, Krasnia Prenia Fairground, Pavillion 3, Moscow, U.S.S.R.", by the Michigan manufacturer [CR 31, p. 141, Exhibit 44]. The equipment was subsequently transferred on October 18, 1984, by Mr. Gorsky of CIT's Moscow office to the "NII Institute for Clinical and Experimental Surgery in Kiev . . . for the purpose of testing" [CR 31, pp. 142-143, Exhibit 45; CR 103, p. 25]. No pre-litigation document shows any connection between V/O Medexport and this equipment. As with the other equipment, the "Sarns" equipment was in the Soviet Union on "consignment" and CIT was unable to "complete" a contract for its sale [CR 33, Affidavit of Diane Brown at ¶¶ 5 and 6].

In regard to the "Sarns" equipment, plaintiffs filed a statement of Gregorian admissible as non-hearsay under *both* provisions of Federal Rule of Evidence 801(d)(2)(A) (*i.e.* an admission that is the party's own statement in both an individual and representative capacity). This document [CR 31, pp. 23-24, Exhibit 9] is a letter from Gregorian to Mr. W.F. Clark, International Sales Manager of Sarns International, dated May 6, 1985 (after the filing of the Amended Complaint herein), accompanies payment by check for the equipment at issue in the Seventh Claim for Relief, and states:

> Dear Mr. Clark
>
> Referring to our conversation today, enclosed please find our check in the amount of $29,911.28

> As explained to you over the phone, we still do not have a contract from the Russians, and, of course, we have not been paid by them. However, a promise is a promise. CIT has always kept its promises, particularly when it comes to payables, as we value our credit standing which is very good.
>
> I thank you for your patience, however, in talking to other members of the company, I found out that the equipment was left with the Russian enduser with your consent for an unspecified time and we did everything possible to sell it so that you could get your money rather than have the equipment returned. Please accept this check as a show of our good faith to Sarns because of our long-standing relationship.
>
> [The balance of the letter, an appeal to not terminate the business relationship, is not relevant except for its failure to assert that V/O Medexport—or anyone else other than Gregorian—had ever "promised" to pay for the equipment]

4. Summary of Uncontested Facts

In summary, there is nothing in the record to indicate that Gregorian or CIT had ever communicated in writing with V/O Medexport concerning any of the medical equipment at issue prior to commencing the litigation.[7] The sole exception [CR 31, p. 153, Exhibit 51], is the intra-Moscow telex in which CIT unsuccessfully sought to sell the "Technicon" equipment to V/O Medexport on December 20, 1984. As there is nothing in the pre-litigation record indicating any "promise" of V/O Medexport to pay for the medical equipment, so there is nothing in the record concerning how such "payment" was purportedly to be made.

---

7 It is of note that Gregorian filed in the district court a self-described "contract" between "V/O Medexport and California International Trade" for the "Sarns" equipment discussed in the letter to Mr. Clark ("we still do not have a contract"), *supra* [CR 31, p.144, Ex. 46] The "contract" is unsigned by V/O Medexport and with no indication it was ever seen by V/O Medexport. On its face, this non-existent "contract" was simultaneously created by Gregorian with the commencement of this litigation on January 7, 1985. Similarly created unsigned "contracts" were filed in the district court by Gregorian as to the other medical equipment at issue [CR 31, pp. 87, 89-90, Exhibits 36 and 38]

This "consignment equipment" was sent to CIT in the Soviet Union to exhibit at trade fairs [CR 31, pp. 86, 141], and thereafter placed by CIT's Moscow office with Soviet institutions for testing [CR 31, pp. 91, 93, 142, 143]. Gregorian's Moscow office "did everything possible to sell" the equipment so that the manufacturers would "get [their] money rather than have the equipment returned" [CR 31, p. 23]. They were unable to complete the sales, as stated by the Vice-President of C.I.T. "Days and weeks were spent on completion of these contracts with absolutely no cooperation and no results" [CR 33, Affidavit of Diane Brown at ¶ 6], and by Gregorian "we still do not have a contract" [CR 31, p. 23], and were then obliged to have the equipment returned.

Finally, there is nothing in the record, dating from before the January 7, 1985 commencement of the litigation, that connects V/O Medexport directly or indirectly with the publication of the Izvestia article that explained the reasons for Gregorian's loss of accreditation.

5. Contested Allegations

Gregorian, in an affidavit executed on August 29, 1985, alleged that unnamed "officials" of V/O Medexport, "during a visit . . . to Technicon's Tarrytown, New York facilities in October of 1982," asked that the "Technicon" equipment (Fifth Claim for Relief) be sent to the Soviet Union and "guaranteed that it would be sold" [CR 32, Gregorian Affidavit at ¶ 65]. The affidavit alleges that an extended series of business negotiations followed in Moscow, in which CIT was unable to get a contract signed despite "promises" to pay ("V/O Medexport officials told us on several occasions that if we did not want to wait to get the contract, we would have to ship the equipment back.") [Id. ¶¶ 69-72].

In a later declaration under penalty of perjury executed on November 28, 1986, Gregorian alleged that the conversations with V/O Medexport representatives in October of 1982 constituting the supposed "agreement" as to the "Technicon" equipment, took place now in Palo Alto, California. The

representatives of V/O Medexport, instead of "guaranteeing that it *would be sold*," now "agreed to pay CIT $85,000 for the equipment." "I gave them a price quote and [they] accepted" [CR 86, Gregorian Declaration at ¶¶ 3-4]. What's more, "all payments were to be made by V/O Medexport to CIT in California." [*Id.*, ¶ 7] The prior August 29, 1985 ("Tarrytown") affidavit stated that when the equipment was shipped to CIT in Moscow for the Electronmash-82 exhibition, CIT "received the equipment from Technicon on consignment." [CR 32, Gregorian Affidavit at ¶¶ 65, 67]. No allegations as to an October, 1982 agreement on price, let along place of payment, were in the August 29, 1985 Tarrytown affidavit.

The August 29, 1985 Tarrytown affidavit alleges that unspecified persons at V/O Medexport, in negotiations in Moscow in 1984, "advised [CIT] that a contract would be signed" for the "Mennen" equipment (Sixth Claim for Relief). The Tarrytown affidavit alleges that in 1984 V/O Medexport officials in Moscow "said that they could . . . sign the contract before the end of the year with payment in January 1985" for the "Sarns" equipment (Seventh Claim for Relief). [*Id.*, ¶¶ 77, 83-4] As to the "Sarns" equipment there is no allegation that V/O Medexport had anything to do with bringing the equipment into the Soviet Union. [*Id.* ¶ 83] As to the "Mennen" equipment, it is alleged that CIT approached V/O Medexport in Moscow and was "authorized" to supply the equipment to a hospital. [Id. ¶ 77]

The November 28, 1986 ("Palo Alto") Gregorian declaration improves these "facts". The "sale" of the "Mennen" equipment becomes "a direct result of the negotiations and conferences with the V/O Medexport representatives in October 1982 and November 1982 in Palo Alto" [CR 86, Gregorian Declaration at ¶ 6]. As to both "Sarns" and "Mennen" equipment, now "all payments were to be made by V/O Medexport to CIT in California." [*Id.* ¶ 7].

It is to be noted that there is no pre-litigation confirmation in writing of *any* of the various "promises", "advisements", "authorizations", etc. ascribed to unspecified representatives of V/O

Medexport in the Tarrytown affidavit and the Palo Alto declaration.

On January 20, 1987, V/O Medexport filed the testimony given under penalty of perjury of Youri Evguenievich Gorsky, employee of CIT in Moscow from December 1983 to February 1985, and of Siddhartha Bose, currently resident in London, England and from 1982 to 1984 Vice-President of CIT and the firm's representative in Moscow. The Gorsky testimony avers that the medical equipment was brought into the Soviet Union "for testing exclusively." "V/O Medexport bore no relation either to the bringing into the USSR or to testing of the said equipment . . ." "The CIT firm had concluded no contracts with the V/O Medexport for this equipment." "[T]he CIT firm sent letters to those medical institutions pledging the taking out of the equipment on conclusion of the tests in case the equipment was not intended to be bought" [CR 103, p.25].

Siddhartha Bose averred that the medical instruments were transferred to Soviet organizations for testing. "The transfer and acceptance of these instruments were done without the knowledge or participation of the V/O Medexport . . ." "As the instruments were intended for testing only they were taken out of the USSR by the CIT firm at its own expense" [CR 103, p.34].

ARGUMENT

STANDARD OF REVIEW

The district court's denial of the motion to set aside the default judgment as void for lack of jurisdiction is subject to review *de novo*. *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (district court has non-discretionary duty to grant relief from void default judgment). The denial of the Rule 60(b)(6) motion to set aside the default judgment for other reasons justifying relief is subject to review for abuse of discretion. *Dias v. Bank of Hawaii*, 764 F.2d 1292 (9th Cir. 1985).

De Novo Review on Jurisdiction; Review of Factual Predicates

Review of the district court's order on jurisdiction is *de novo* "because the construction of a statute granting jurisdiction is a question of law. *Societe de Conditionnement en Aluminium* v. *Hunter Engineering Co.*, 655 F.2d 938, 941 (9th Cir. 1981)." *Spawr* v. *United States*, 796 F.2d 279, 280 (9th Cir. 1986).

Review of Validity of Default Judgment Is on the Pleadings

The district court's July 17, 1985 order finding subject matter jurisdiction was made on the pleadings. At that time no other material was in the record; indeed, the time for V/O Medexport to answer had not yet run. The district court did not re-examine the question of its jurisdiction when entering default judgment [See Transcript of October 7, 1985]. Review of the validity of the default judgment as based on the July 17, 1985 order (in which jurisdiction was asserted) is straightforward; either the complaint pleads subject matter jurisdiction or not.

If on *de novo* review the allegations of the complaint do not support jurisdiction, the district court's July 17, 1985 order was error and the complaint should then have been dismissed. *Meadows* v. *Dominican Republic*, 817 F.2d 517, 520 (9th Cir.), *cert. denied* 108 S.Ct. 486 (1987); *Meadows* v. *Dominican Republic*, 542 F.Supp. 33 (N.D. Cal. 1982) (allegations did not support jurisdiction and complaint dismissed; plaintiffs permitted to replead and serve amplified pleadings).

Review of Order Refusing To Set Aside Default for Lack of Jurisdiction Is for Prima Facie Case on the Evidence

De novo review of the district court's order of April 5, 1987 (refusing to vacate the default judgment as void for lack of jurisdiction) requires review of the record insofar as the decision of the district judge went (or should have gone) beyond the allegations of the complaint.

The district court made no identifiable findings of fact (and never once referred to the record) in any opinion or order in regard to the "contract" claims. The appropriate treatment of the factual record is therefore a necessary determination antecedent to construction of the jurisdictional provisions of the Foreign Sovereign Immunities Act ("FSIA") 28 U.S.C. §§ 1602-1611. This court has had occasion to note that findings with reference to the record would be (at minimum) "helpful" when a district court has resolved questions of fact in determining subject matter jurisdiction. *Societe de Conditionnement en Aluminium* v. *Hunter Engineering Co.*, 655 F.2d 938, 942, 946 (9th Cir. 1981).

The procedure that this Court followed in *Societe de Conditionnement, supra*, provides a guide. There are two standards which the district court must sequentially use in assessing the facts to determine jurisdiction: prima facie case based on the evidence and preponderance of the evidence. *Id.*, at 942. In the April 5, 1987 order (refusing to set aside the July 17, 1985 order as to the "contract" claims), it is clear that the district court did not "weigh the evidence." The only comment of the district court relevant to the question indicates that its inquiry stopped well short of the preponderance test: "[D]efendants deny the truth of plaintiffs' claims. If the facts that defendants allege are true, they would prevail." 658 F.Supp. at 1237. The district court recognized the evidentiary conflict, but declined to resolve it.

Review must therefore focus on whether or not there is a prima facie case in regard to subject matter jurisdiction on the evidence. "[I]t is appropriate for a court of appeals to examine a record to determine if the evidence is sufficient to 'establish a prima facie showing of jurisdictional facts.'" *Societe de Conditionnement, supra*, 655 F.2d, at 942, quoting *Data Disc, Inc.* v. *Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977).

However, peculiar to the FSIA is the burden on the *defendant* to make a prima facie case that there has been no act within the exceptions in Sections 1605-1607, upon which showing there is a presumption of immunity. *Meadows* v. *Dominican Republic, supra*, 817 F.2d at 522-523. The central question on review is

therefore whether defendant's evidentiary showing [CR 103, pp. 19 *et seq.*] of a prima facie case that there were no acts within the exception to immunity of Section 1605(a)(2), is (read together with the uncontested evidence) sufficient to establish the presumption of immunity. If so, the district court erred and the default judgment is void for lack of jurisdiction. If not, the matter must be remanded to the district court to weigh the evidence under the proper legal standard to determine jurisdiction. *Societe de Conditionnement, supra*, 655 F.2d at 942.

I.

DEFENDANT MADE A PRIMA FACIE CASE THAT NO EXCEPTION TO IMMUNITY APPLIED, ESTABLISHING A PRESUMPTION OF IMMUNITY. PLAINTIFFS DID NOT MEET THEIR BURDEN OF GOING FORWARD WITH THE EVIDENCE. UNDER THE FSIA THE DEFAULT JUDGMENT IS VOID.[8]

In *Meadows* v. *Dominican Republic, supra*, 817 F.2d at 522-523, a five-step sequential procedure for determinations of jurisdiction under the FSIA was set out as follows:

1. Presumption of immunity. Acts of foreign states are presumed to be immune unless one of the ennumerated exceptions to immunity of the FSIA applies.

2. Sufficiency of plaintiffs' allegations. The plaintiffs must sufficiently allege that one of the ennumerated exceptions applies.

3. Defendant's assertion of prima facie case for immunity. The defendant must present factual allegations that no exception applies, which re-establishes the presumption of immunity. The legislative history on which this procedure is based states (as to Step 3) as follows: "Evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim

8. In the district court V. O. Medexport raised and argued the point that once it had presented evidence that there was no exception to immunity (The Bose and Gorsky Testimony, CR 103, pp. 19 *et seq.*), the district court was obliged to credit that testimony unless plaintiffs went forward in an evidentiary proceeding [Transcript of January 28, 1987, pp. 16-17 and 54].

relates to a public act of the foreign state—that is, *an act not within the exceptions in sections 1605-1607*." H.R. Rep. No. 1487, 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6616 (emphasis added) ("House Report"). V/O Medexport presented the testimony under penalty of perjury of CIT and Gregorian's own employees, including the Vice-President in charge of CIT's Moscow office at the relevant time [CR 103, pp. 19 *et seq.*]. These proofs fully met any possible burden on the defendant under Step 3, *i.e.* on the facts presented by the Gorsky and Bose testimony the plaintiffs' claim does not relate to an act within any exception of Section 1605. Indeed, the district court acknowledged that the Gorsky and Bose testimony established a prima facie case ("[i]f the facts that defendants allege are true, they would prevail." 658 F.Supp., at 1237)

4. Plaintiff's burden of going forward. The plaintiff then has the burden of going forward with evidentiary proof that an exception applies.

5. Defendant's burden of persuasion. The defendant then has the burden of persuasion by preponderance of the evidence that no exception applies.

Here, the inquiry never went past Step 3. Defendant met its burden of establishing a prima facie case with the proofs submitted on January 20, 1987 [CR 103, pp. 19 *et seq.*]. Plaintiffs did not go forward with evidence contradicting the defendant's proofs as required by *Meadows* Step 4. Plaintiffs' sole response was the unsworn statement that the testimony of Bose and Gorsky "were obtained pursuant to KGB request" [CR 108, p. 3]. An unsworn appeal to political prejudice cannot substitute for the *Meadows* burden of going forward with the evidence.

The district court committed error in failing to apply the proper legal standard to determinations of jurisdiction under the FSIA when it failed to accord defendant the presumption of immunity required by *Meadows*, once a Step 3 prima facie case had been made by defendant.

II.

ON THE UNCONTESTED EVIDENCE, THE DISTRICT COURT LACKED BOTH SUBJECT MATTER AND PERSONAL JURISDICTION UNDER THE FSIA; NO "DIRECT EFFECT"[9]

Under 28 U.S.C. § 1330(a), a district court has subject matter jurisdiction over a claim against a foreign state only if the foreign state is denied immunity from suit under 28 U.S.C. §§ 1605-7. As to a foreign state defendant, "both statutory subject-matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the [FSIA] . . . [I]f none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject-matter jurisdiction and personal jurisdiction." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 n.5 (1983). In the "contract" claims at issue on this appeal, no exception to immunity under 28 U.S.C. § 1605 applies, and therefore the district court lacked both statutory subject matter jurisdiction and personal jurisdiction over appellant V/O Medexport. This inquiry is limited to the uncontested evidence; the Bose and Gorsky testimony enjoys the presumption of Step 3 of the *Meadows* standard, 817 F.2d, at 522-523. Prior controverted allegations of the plaintiffs therefore cannot serve as a basis for jurisdiction.

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9 In the district court, V/O Medexport raised and argued the point that there were insufficient contacts between the alleged transactions and the United States to come within any exception to immunity *under the FSIA*. See, e.g. Transcript of January 28, 1987 pp. 15-16. Confused by the statutory conflation of subject-matter and personal jurisdiction, the district court reached the wholly erroneous conclusion that subject-matter jurisdiction as to the "contract" claims had been "conceded." 658 F.Supp. at 1229, 1238. This is the identical mistake that the Supreme Court was addressing in *Verlinden*, *infra*, 461 U.S. at 486 n.5. "The FSIA merges the questions of subject matter and personal jurisdiction." *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 589 n.10 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984).

A. No "Direct Effect" Exception to Immunity From Alleged Injury to an American Corporation Overseas; *Australian Government Aircraft Factories* v. *Lynne*, 743 F.2d 672 (9th Cir. 1984).

The district court erroneously found statutory subject matter jurisdiction as to the "contract" claims at issue in the third clause of 28 U.S.C. § 1605(a)(2) which states: "the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act caused a direct effect in the United States." 658 F.Supp., at 1234.

This section has been dispositively interpreted by this Court in *Australian Government Aircraft Factories* v. *Lynne*, 743 F.2d 672 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985), *not* to include the financial loss in the United States resulting solely from the domicile or nationality of the entity engaging in overseas business. In *Australian Government*, a California corporation sought to impose liability on a foreign state defendant for the losses sustained from the purchase abroad of an allegedly defective aircraft. 743 F.2d, at 673, 675. It was undisputed that the sale of an airplane was "commercial" activity. The California corporation argued that the resulting financial loss in the United States (including the cost of replacing the aircraft) was a "direct effect" within the meaning of the third clause of 28 U.S.C. § 1605(a)(2), relying on *Texas Trading and Milling Corporation* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). In *Texas Trading*, the Second Circuit had found a "direct effect" in the United States from the undisputed breach of four written, signed contracts calling in writing for payment through New York banks, with terms of payment spelled out in detail. 647 F.2d, at 303, 312.

This Court decisively rejected the argument of the California corporation: "Unlike *Texas Trading*, where no injury occurred until the American companies were denied payment from a New York bank as a result of Nigeria's repudiation of cement contracts, the direct injury in this case occurred overseas where the

loss of the plane took place." *Australian Government, supra*, 743 F.2d, at 675. The financial loss suffered in the United States by the California corporation from its commercial injury overseas was held "indirect," and the "direct effect" exception of 28 U.S.C. § 1605(a)(2) was not available "to abrogate the general rule of foreign sovereign immunity." *Id.*

The interpretation of § 1605(a)(2) "direct effect" language established by *Australian Government* "requires that either an injury or an act occur in the United States for jurisdiction to exist." *Yugoexport, Inc.* v. *Thai Airways International, Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984) (finding no "direct effect" from claim of loss arising from commercial actions outside the United States, although foreign state defendant maintained office and commercial presence in the United States). By this governing standard, the district court erred in finding "direct effect" jurisdiction as to the "contract" claims both on the pleadings and on the basis of the uncontested evidence.

B. The Complaint Fails To Allege That An Exception To Immunity Applies

The first necessary inquiry is whether the complaint sufficiently alleges that an exception to immunity applies; if it fails to do so, plaintiffs have not met their initial burden (Step 2 of the *Meadows* FSIA procedure on jurisdiction, *supra*, at p. 18), the July 17, 1985 order finding jurisdiction was error, and the "contract" claims should have been dismissed. *Meadows, supra*, 817 F.2d, at 520; 542 F. Supp. 33. There is no allegation in the complaint of jurisdictional facts constituting an exception to immunity under 28 U.S.C. § 1605(a)(2).

There is no allegation in the complaint that relates the alleged oral "contracts" for the sale of medical equipment at issue to the United States in any fashion. In the Fifth through Eighth claims for Relief, the words "United States" do not appear [CR 2, pp. 14-18]. There is no allegation of fact suggesting any possible connection between the oral "contract" claims and the Izvestia article complained of in the Tenth Claim for Relief ("libel").

In summary, there is nothing whatsoever in the complaint alleging that any supposed incident of the oral "contracts" (*i.e.*, purported agreement, delivery, payment conditions, etc.), as between CIT and V/O Medexport took place anywhere other than in the Soviet Union.

Because the failure to plead jurisdiction would do no more than set aside the default and permit plaintiffs to serve amplified papers, *Meadows, supra*, 817 F.2d, at 520, the inquiry must proceed to test the sufficiency of the uncontested evidence. However, the failure to plead jurisdiction is decisive as to the error committed by the district court in refusing to set aside the default under Rule 60(b)(6) for supposed "culpability" in failing to appear. See *infra*, p. 33 *et seq*. There can be no "culpability" in failing to appear on a complaint that on its face should have been dismissed *sua sponte* by the district court. A district court should *sua sponte* dismiss a complaint drawn under the FSIA if no sufficient exception to immunity is alleged, even though the foreign state has not appeared. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985).

C. There Is No Uncontested Evidence To Support a Conclusion that an Exception to Immunity Applies

The district court asserted jurisdiction (in the order appealed from) solely under the "direct effect" exception to immunity of the third clause of Section 1605(a)(2). 658 F. Supp., at 1234. No reference to anything in the record in support of its legal conclusions was made by the district court. *Id*. On examination of the competent uncontested evidence on *de novo* review, *Societe de Conditionnement, supra*, 655 F.2d, at 942, there is no showing of a "direct effect" as defined by *Australian Government*.

The district court's speculative conclusions (without reference to the record) on which it based its ultimate finding of "direct effect" subject matter jurisdiction are brief:

> The action is based upon contractual disputes between plaintiffs and Soviet defendants that took place in the USSR in connection with trading activity of the USSR

> with the United States. The acts complained of resulted in the failure of Soviet and American banks to transfer payment from the USSR to plaintiffs in California. It further resulted in financial loss, including the disruption of CIT's relations with its U.S. suppliers. Additionally, even though plaintiffs may not state a claim against the USSR for libel, the defamatory Izvestia article, which was printed in the USSR and circulated in the United States, may be seen as a direct effect of the defendants' acts. Thus, the requirements of § 1605(a)(2) are satisfied.

658 F. Supp., at 1234.

The evidentiary basis for the district court's conclusory assertion that "[t]he acts complained of resulted in the failure of Soviet and American banks to transfer payment from the USSR to plaintiffs in California" is the question on review on which FSIA jurisdiction depends. The district court did not reveal the process that led it to this theory. There is no evidentiary basis for the statement. No breached contract provisions to make payments in the United States were alleged in the complaint [CR 2]; no pre-litigation document in the record supports any contractual term to make payments in the United States as to any of the equipment at issue.[10]

Comparison with *Texas Trading* and *Meadows* is instructive. In *Texas Trading* it was not in dispute that the defendant was party to a written contractual agreement whose written terms provided for payment to banks in the United States, 647 F.2d, at

10 The absence of any reference to the record by the district court is of particular significance in regard to its theory that the defendant had some obligation to make a payment in the United States. It would show scant respect for the intelligence and experience of the district court to suggest that it had credited, *sub silentio*, the belated and incredible Palo Alto declaration of January 7, 1987, filed two years (to the day) after the litigation was commenced [CR 86]. In fact, it appears that the Palo Alto declaration was studiously avoided by the trial court. Otherwise, there would have been neither reason nor need to base minimum contacts jurisdiction on the diplomatic presence of the Soviet Union in the United States. 658 F.Supp., at 1236. In all events, once the Bose and Gorsky testimony had been proferred in fulfillment of V/O Medexport's Step 3 ("prima facie case") burden, prior inconsistent allegations could not be relied upon by the district court as a matter of law. *Meadows*, *supra*, 817 F.2d, at 522-523.

303. In *Meadows* the district court's transactional finding of fact upon which this Court found "direct effect" jurisdiction was as follows: "The contract provided that the 'transaction must be made through our bank . . . *and through your [plaintiffs']* bank.'" 817 F.2d, at 523 (emphasis in original).

If V/O Medexport is entitled to any degree of review of the uncontested evidentiary record in this appeal, "direct effect" jurisdiction cannot be premised on a non-existent contractual term to pay to United States banks. V/O Medexport is entitled to review of the evidentiary record in this Court. *Societe de Conditionnement, supra*, 655 F.2d, at 942.

The financial consequences in the United States that arise not from the immediate alleged transactions, but from Gregorian and CIT's residence and domicile are, of course, not "direct effects." *Australian Government, supra*. Thus, CIT's contractual payment to the manufacturers for the medical equipment that CIT was then unable to sell (or re-sell, if one prefers) cannot be a "direct effect." For example, the payment to Technicon in Vienna by CIT in California [CR 31, p.88, Exhibit 37], for the "consignment" equipment allegedly the subject of simultaneous fruitless business negotiations in Moscow [CR 32, Gregorian Tarrytown affidavit at ¶¶ 65-72], is both logically and geographically an indirect effect, if an effect at all.

D. There Is No Basis In The Uncontested Evidence For "Direct Effect" Jurisdiction Arising From The Izvestia Article As A Consequence Of Alleged Breach Of Oral Contract

In a manner indicating something less than a "finding of fact," the district court advanced as possible an hypothesis that the Izvestia article explaining the reasons for Gregorian's loss of accreditation "may be seen as a direct effect of the defendants' acts." 658 F. Supp., at 1234. The district court's use of the permissive or discretionary (but not compelling) term "may" was a step in the right direction, but not justified. No pre-litigation

document supports the hypothesis that the cause of the Izvestia article was the alleged breach of oral contract.

The hypothesis that the Izvestia article was an "effect" of the medical equipment claims was not explicitly advanced by Gregorian in the complaint. It appeared (if at all) only in the vague all-inclusive "conspiracy" claim [CR2, Fourteenth Claim for Relief]. The hypothesis that the purported breach of oral contract directly caused the Izvestia article does not even appear on deliberate (if not careful) reflection in the Palo Alto declaration [CR 86]. Nor does the hypothesis appear in the Tarrytown Affidavit [CR 32]. As Judge Friendly said of the Alien Tort Claim Act, (28 U.S.C. § 1350), the district court's speculation as to a causal linkage between the supposed breach of oral contract and the Izvestia article "is a kind of legal Lohengrin," there is no way "to know whence it came." *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

The hypothesis that the Izvestia article was an "effect" is without evidentiary basis and may be disregarded as a grounds for "direct effect" jurisdiction. Conclusively, the district court dismissed the (Fourteenth) Claim that the alleged "libel" was in furtherance of a conspiracy involving the USSR, Ministry of Foreign Trade and V/O Medexport, finding that the evidence in support of such a conspiracy was "insufficient as a matter of law" [CR 182a]. If the evidence is insufficient as a matter of law to sustain the conspiracy claim, it is analytic that the evidence is insufficient as a matter of law to sustain the hypothesis that the Izvestia article is an "effect" of the alleged breach of oral contract. Once the "conspiracy" disappears, so does any causal relationship.[11]

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11 The district court's comment that "[i]ndeed, application of the FSIA to instances 'when U.S. businessmen sell goods to a foreign state trading company' was specifically anticipated by Congress. U.S. Code Cong. and Ad. News *supra* at 5605" is literally correct, and therefore wholly irrelevant to the determination of *how* the FSIA was to be applied. That is, whether the FSIA provides for immunity or not in any given factual situation. The quoted material is not in reference to exceptions to immunity under Section 1605 (or any other section) at all. It appears in an introductory "Statement," that explains that (prior to the FSIA) comprehensive provisions in our law were lacking "to

Finally, even were the hypothesis to be credited that the Izvestia article is an "effect" of the purported breach of oral contract, the supposed injury to Gregorian from the circulation of Izvestia in the United States is not a "direct effect". The legislative history of Section 1605(a)(2) suggests that "direct effect" be interpreted in accordance with Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States (1985). House Report, at p. 6618. That Section requires that: (1) both conduct and effect be non-immune activity; (2) the effect in the United States be substantial; and (3) the effect be "a direct and foreseeable result of the conduct outside" the United States. Restatement (Second) of the Foreign Relations Laws of the United States, § 18 (1965). Under each element there is no "direct effect": the causal linkage is extended and indirect, not foreseeable, and with insubstantial United States consequences. Under the first Restatement requirement, both conduct and effect must be non-immune activity; if the purported "libel" be immune activity, it cannot serve as the "direct effect" creating otherwise non-existent jurisdiction.

III.
THE DISTRICT COURT ERRONEOUSLY APPLIED THE "DOING BUSINESS" TEST TO FIND FSIA JURISDICTION; THE "DOING BUSINESS" TEST DOES NOT APPLY TO AN FSIA CASE[12]

It is well established that the commercial activity exceptions to sovereign immunity of Section 1605(a)(2) incorporate the minimum contacts due process standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). *Thos. P. Gonzalez*

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inform parties *when* they can have recourse to the courts . . ." House Report, at 6605. To determine the answer requires application of the specific provisions of the act, here the "direct effect" clause of § 1605(a)(2). The illogical shortcut that because the FSIA now governs whether a foreign state trading company will be immune (or not) in dealing with a U.S. businessman, therefore all such dealings are not immune, is impermissible.

12. In the district court, V/O Medexport raised and argued the point that minimum contacts were lacking and that the "doing business" test does not apply to an FSIA case. See, eg, Transcript of January 28, 1987, pp. 12-16.

Corp. v. *Consejo Nacional, supra*, 614 F.2d 1247, at 1255. But this does *not* "mean that the statutory standard for determining non-immunity is co-extensive with the due process standard governing personal jurisdiction." *Maritime International Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1105 (D.C.Cir. 1982), *cert.denied*, 464 U.S. 815 (1983). The district court acknowledged that "due process notions of minimum contacts are *incorporated* into the provisions [of the FSIA]", and that it must apply "constitutional due process standards *to the FSIA*". 658 F.Supp., at 1234 (emphasis added). What the district court failed to comprehend is that while the constitutional requirement of minimum contact is an essential part of the application of Section 1605(a)(2), the inquiry is not "co-extensive."

The constitutional requirement of minimum contact has come to be seen as composed of two elements: "specific jurisdiction" where the suit arises out of the defendant's contacts with the forum; and "general jurisdiction" where a suit does not arise out of the defendant's contacts with the forum but there are sufficient contacts between the forum and the defendant ("doing business"). *Helicopteros Nacionales de Colombia S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 and n.9 (1984).

The district court correctly stated that the minimum contact standard was "incorporated" into the FSIA, but then applied the general jurisdiction "doing business" standard. 658 F. Supp., at 1234-1236. This was error. In an action under the FSIA, the determination of the scope of the exceptions to immunity is limited to the "specific jurisdiction" element of due process minimum contacts. Under all clauses of Section 1605(a)(2), there must be a nexus between the commercial activity in the United States and the cause of action. *Barkanic* v. *CAAC*, 822 F.2d 11, 13 (2nd Cir.), *cert. denied*, 108 S.Ct. 453 (1987); *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 202 (5th Cir. 1984); *Maritime International Nominees* v. *Republic of Guinea, supra*, 693 F.2d, at 1109 n. 23.

Velidor v. *L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).[13]

In the absence of evidence to support "direct effect" jurisdiction under the *Australian Government* standard, there is no FSIA jurisdiction based on a "doing business" general jurisdiction standard.

A. The District Court Erred in Failing To Apply The Minimum Contacts Standard as Set Out In *Thos. P. Gonzalez Corp.* v. *Consejo Nacional*, 614 F.2d 1247 (9th Cir. 1980)

Even were the more restrictive provisions of the FSIA not dispositive, the standard for both specific and general jurisdiction set out by this court in *Thos. P. Gonzalez Corp.* v. *Consejo Nacional*, *supra*, was not met on the uncontested record in this case. In *Thos. P. Gonzalez*, an alleged breach of a *written* contract was at issue. Otherwise, as to all essential elements, the fact pattern was substantially identical to that here. Plaintiff was an American businessman dealing through his foreign agent with an agency of a foreign state in the foreign state. 614 F.2d, at 1249. The disputed contract involved delivery of corn in the foreign country. *Id.*, at 1250. The agency of the foreign state (as here) maintained no business presence in the forum. *Id.*, at 1249.

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13. In its opinion of July 17, 1985 (asserting jurisdiction under all clauses of Section 1605(a)(2)), on which the entry of default judgment was based, the district court exclusively relied upon the lone authority that asserts the propriety of "general jurisdiction"—or "doing business"—as a basis for asserting jurisdiction under the FSIA, *Matter of Rio Grande Transport, Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981), *rev'd on other grounds*, 770 F.2d 262 (2nd Cir. 1985). This aberrant district court opinion was rejected as authority in the Southern District of New York, *Castillo* v. *Shipping Corp. of India*, 606 F. Supp. 497, 502 (S.D.N.Y. 1985) (*Rio Grande* at odds with the overwhelming majority of cases) even before the Second Circuit finally put it to rest in *Barkanic* v. *C.I.A.C.*, *supra*, 822 F.2d, at 13 (nexus required between cause of action and commercial activity in the United States under the FSIA). *Rio Grande Transport* was extensively criticized by the Fifth Circuit in *Vencedora*, *supra*, 730 F.2d, at 201-203, and has been followed by no circuit court of appeals. To adopt the *Rio Grande Transport* "doing business" standard among the commercial activity exceptions of Section 1605 "would be to open the floodgates to any controversy around the world, against any foreign entity 'doing business' in the United States." *Vencedora*, *supra*, 730 F.2d, 202.

As here, there was no express contractual provision requiring payment through a California bank. *Id.*, at 1254. The defendant's foreign bank had transactions with California banks as to other dealings between the parties, but no payment "had yet been made" as to the contract at issue. *Id.*, at 1250; cf. 658 F. Supp., at 1235 (other transactions by V/O Medexport's bank used to *support* jurisdiction). On these facts, this Court held that a default judgment was required to be set aside and the action dismissed for lack of jurisdiction. 614 F.2d, at 1256. On the record in this case, the district court asserted jurisdiction only by ignoring binding precedent of this Court.

B. The District Court Erred in Finding Jurisdiction Based on Diplomatic Presence

The only element not present in *Thos. P. Gonzalez* but present here is the district court's refusal to recognize the separate juridical existence of V/O Medexport, and the consequent finding of personal jurisdiction based on the presence of the Soviet embassy in Washington, D.C. and the Soviet consulate in San Francisco, California. 658 F.Supp., at 1236. Even assuming (contra-factually) that justification existed to ignore V/O Medexport's separate juridical existence, this Court has previously held that diplomatic presence in the forum is an insufficient basis for jurisdiction. *Schmidkunz* v. *Scandinavian Airlines System*, 628 F.2d 1205, 1207 (9th Cir. 1980).

There is no evidence in the record that the Soviet embassy and consulate are other than strictly diplomatic and consular representations. There is nothing to suggest that they have ever carried on any commercial transactions, and certainly nothing in regard to the transactions alleged in the complaint. The consequences of the district court's reasoning are vast; it is an unprecedented assertion of United States jurisdiction over virtually every foreign government owned business entity in the whole world, and would reciprocally yield jurisdiction in every foreign court over all United States entities in which the United States government has

an ownership interest.[14] This doctrine is without support in precedent or common sense, and should be firmly rejected.

C. The District Court Committed Plain Error In Ignoring The Separate Juridical Existence Of V/O Medexport

Soviet lawyer Dmitri Ivanov submitted a declaration asserting that foreign trade organizations (V/Os) are "independent juridical persons." [CR 121, at ¶ 5]. Mr. Ivanov testified, and neither the district court nor plaintiff raised any question as to the independent legal status of foreign trade organizations such as V/O Medexport [Transcript of January 29, 1987]. The issue was not briefed, and defendant was unaware from the record that the separate legal existence of V/O Medexport was in dispute.

In its April 5, 1987 opinion, the district court *sua sponte* attempted to find Soviet law, concluded that V/O Medexport was an "integral" part of the State, ascribed to V/O Medexport the Soviet diplomatic presence in the United States, found personal jurisdiction based on that presence, and declared the finding non-reviewable. 658 F.Supp., at 1235-1236. This is error.[15]

The district court misinterpreted Soviet law. To avoid any further misunderstanding, we set out in the addendum the authoritative memorandum of Professor N. Ushakov, "Jurisdictional Immunities of States and their Property" presented to the International Law Commission of the United Nations, thirty-fifth session, Geneva on May 11, 1983. UN Document A/CN.4/371. In brief summary, under Soviet law foreign trade organizations are legally distinct and apart from the State and its organs. No claim is made that under *international* law they enjoy State immunity in commercial transactions. [A-8] Here, of course,

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14 *E.g.* the large number of major banks in which the FDIC has taken an ownership interest.

15 If it is the case that *Meadows* stands for the proposition that error in interpreting foreign law so as to ignore the separate juridical existence of the agency of a foreign state on a Rule 60(b)(4) motion is non-reviewable, absent a prior successful motion under some other section of Rule 60, *Meadows*, 817 F.2d, at 524, we predicate review on the prior review of the Rule 60(b)(6) motion (*infra*).

V/O Medexport claims immunity under United States *domestic* law—the FSIA. This distinction wholly escaped the district court. 658 F.Supp., at 1229 n.3.

Apart from this error in finding Soviet law, the district court ignored domestic law. The Supreme Court has stated that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 626-627 (1983) (concluding that presumption of separate identity was overcome on the extraordinary factual record in the case). The legislative history of the FSIA is to the same effect: "If U.S. law did not respect the separate juridical identities of different agencies . . . it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations, or between a U.S. corporation and its independent subsidiary." House Report, at pp. 6628, 6629.

No factual pattern that would justify setting aside the presumption of separateness appears from the record. Cf. *Bancec*, *supra*, 462 U.S., at 633 n.27. The sole factual predicate on which the district court relied was the Certificate of Accreditation, requiring CIT to operate only through the Ministry of Foreign Trade. 658 F.Supp., at 1235.[16] This administrative requirement is irrelevant to the fact of separate juridical existence. The only relevant fact in the record is the unquestioned declaration of a Soviet lawyer *asserting* Medexport's separate juridical existence. By any standard of review, this gross error cannot be permitted to stand.

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16 The district court indicated that on this basis, it had "found" (past tense) V/O Medexport and V/O Licensintorg to be acting as "either agents or alter egos of the Ministry." 658 F.Supp., at 1235. However, no prior opinions of the district court contained any such "finding."

IV.

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO SET ASIDE THE DEFAULT UNDER RULE 60(b)(6)[17]

Federal Rule of Civil Procedure 60(b)(6), permitting a district court in its discretion to set aside a default judgment "for other reasons justifying relief," is "a grand reservoir of equitable power to do justice in a particular case." *Seven Elves, Inc.* v. *Eskenazi*, 635 F.2d 396 (5th Cir. 1981). Review of the district court's exercise of discretion must cover not only the strengths and weaknesses of the parties' position, but the entire context of the case.[18]

The Soviet Union, sovereign of V/O Medexport, has rejected as offensive to international law the plaintiffs' challenge to acts of a sovereign nature (the so-called "libel") performed within its own territory. It has rejected as well the plaintiffs' claim that it can proceed in a foreign court on "agency" allegations against V/O Medexport, based on the self-same challenge (*i.e.*, "libel") to the sovereign acts of the Soviet State. Because of the centrality of the "libel" allegations to plaintiffs' complaint, and in adherence to the position of its sovereign, V/O Medexport did not initially appear in the action below. [See generally CR 71 and CR 74]. The appearance of V/O Medexport was the result of extended diplomatic negotiations, that commenced on September 29, 1986. [CR 74, p. 5]. It was the direct result of the "encouragement" of the government of the United States of America to

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17 In the district court, V/O Medexport raised and argued the point that the default judgment should be set aside pursuant to Rule 60(b)(6). See e.g. Transcript of January 28, 1987, pp. 34-45.

18 Evaluation of the merits of the district court's decision denying relief under Rule 60(b)(6) is hampered by the absence of identifiable findings of fact that would underlie the conclusory reasoning of the order appealed from. On a Rule 60 motion the district court must "look to 'the competing equities [and] the strengths and weaknesses of the parties' position.'" *Halderman* v. *Pennhurst State School & Hospital*, 673 F.2d, at 637." *Dias* v. *Bank of Hawaii*, 764 F.2d 1292, 1295 (9th Cir. 1985).

seek "resolution of this case within the United States' legal system." [*Id.*] The appearance was intended to be, and was perceived by the government of the United States as "an important step . . . to remove a potentially serious irritant in our bilateral relations through amicable means." [*Id.*, p. 8].

In this context, the district court, satisfied that all other conditions to setting aside the default under Rule 60(b)(6) were met, denied V/O Medexport's motion solely on the ground that the position of its sovereign was "culpable," likening the position taken by the Union of Soviet Socialist Republics to "draft evasion." 658 F. Supp. 1237-1239. This was abuse of discretion.

A. Defaults are Disfavored; When Defendant Has a Meritorious Defense Doubts Must Be Resolved In Favor Of The Motion To Set Aside the Default

The two policy concerns that guide review of a motion under Rule 60(b) have been repeatedly articulated by this Court. "First, Rule 60(b) is meant to be remedial in nature and therefore must be liberally applied. (citation omitted) Second, judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." *Falk* v. *Allen*, 739 F.2d 461, 463 (9th Cir. 1984). The factors to be evaluated on a motion to set aside a default judgment are: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. *Id.*

As the district court found, plaintiffs could suffer no prejudice from opening the default. 658 F.Supp., at 1237. The district court also noted that V/O Medexport, based on the evidence presented, has a meritorious defense. *Id.*[19] Once these two

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19 V/O Medexport has a meritorious defense even in the absence of the evidence it put forward on the jurisdictional question [CR 103, pp 19 *et seq*.] If the law of a United States jurisdiction were to apply, the statute of frauds is an absolute bar to this action. The policy behind this rule is particularly appropriate on the record in this case. "[t]he statue of frauds permits a party to welch on an oral bargain, in order to avoid the risk that an oral contract may be proved by fraudulent testimony." *Presti* v. *Wilson*, 348 F. Supp. 543, 545 (E.D.N.Y.

determinations have been made, a further equitable presumption results: "[t]he meritoriousness of the defense coupled with the lack of any significant prejudice to plaintiff should [lead] the district court to resolve in [defendant's] favor any doubts in connection with the motion to vacate." *Schwab* v. *Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974). This the district court failed to do.

B. V/O Medexport Was Not Culpable

We set out the position of the Soviet Union on sovereign immunity in the addendum. We have previously pointed out that V/O Medexport, as to the "contract" claims, asserted immunity under United States law and not under international law. pp. 31-32, *supra*.[20] As to the "libel" claim, V/O Medexport and V/O Licensintorg asserted their immunity under both domestic and international law, and the district court agreed and reversed its prior erroneous order of July 17, 1985 in the opinion reported at 658 F. Supp. 1224. In its order of July 17, 1985, the district court asserted jurisdiction over the "contract" claims based solely on its erroneous assertion of jurisdiction over the "libel" claim, stating that all claims were part of the same "transaction." [CR 22]. Yet V/O Medexport was found "culpable" for "acting" on the belief that a) jurisdiction of the district court depended on the "libel" claim, and b) that there was absolute immunity as to the "libel" claim. That is, positions that the district court itself has (on occasion) asserted.

The point is not that the district court was correct in 1985 and incorrect in 1987, or *vice versa*, but rather that the case presents novel and undecided jurisdictional issues. V/O Medexport has substantial and compelling defenses. It appeared at the behest of

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1972). By the standards governing choice of law, it is most likely on the record in this case that Soviet law would govern. The result would be identical to that when the statute of frauds is applied.

20. Insofar as the district court's total misconception that V/O Medexport had "acknowledge[d] the Court's subject matter jurisdiction over the contract claims," 658 F. Supp. at 1238, formed a basis for its Rule 60(b)(6) determination, this error alone would require reversal.

its government, and on the urging of the United States of America. It wished (and wishes) to respectfully present its position on the merits to the Central District of California, in a matter it believes to be totally outside the competence of that court, so as to remove an irritant in international relations. These considerations amount to the extraordinary circumstances that make it an abuse of discretion not to have granted relief under Rule 60(b)(6). Cf. *Jackson* v. *People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1371 (1987) (in presence of foreign policy implications and meritorious defense it would be an abuse of discretion not to grant Rule 60(b)(6) motion).

CONCLUSION

On the record in this case, there is a prima facie case that there is no "direct effect" (or other) exception to immunity. The default judgment on the "contract" claims is therefore void for lack of jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq*. The judgment must be vacated and the action dismissed. If this Court finds that an insufficient prima facie case for immunity exists on the evidence, it should vacate the default pursuant to Fed. R. Civ. P. 60(b)(6) and remand the case for determination of jurisdiction by preponderance of the evidence and (if jurisdiction be found) for subsequent trial on the merits.

ANSWERING BRIEF OF CROSS-APPELLEES V/O MEDEXPORT AND V/O LICENSINTORG

STATEMENT OF JURISDICTION

NO JURISDICTION IN THIS COURT

A. The Cross Appeal on the "Libel" Claims Has Already Been Once Dismissed as Not Final; the Subsequent Rule 54(b) Certification Was Error

Appellants Raphael Gregorian and California International Trade Corporation ("Gregorian"), have appealed from part of a district court order of April 5, 1987 vacating a default judgment on, and dismissing, one of seventeen claims for relief in their Amended Complaint ("complaint") [CR 2]. The claim is for "libel" (Tenth Claim), and was asserted against appellees V/O Licensintorg and V/O Medexport, as well as against the Union of Soviet Socialist Republics (USSR), its Ministry of Foreign Trade, and the newspaper Izvestia, organ of the Supreme Soviet of the USSR ("foreign state defendants"). The latter three named defendants have not appeared in these proceedings.

Gregorian first appealed from the April 5, 1987 order dismissing the "libel" claim on May 4, 1987 [CR 144]. This Court dismissed Gregorian's appeal by Order of November 13, 1987 for lack of finality. Gregorian then made an ex parte application for entry of final judgment in the district court on December 1, 1987 [CR 178]. The district court made a Rule 54(b) certification of the order dismissing the "libel" claim by order of December 18, 1987 [CR 180]. The Rule 54(b) Certification was error, a clear abuse of discretion by the district court. *Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414 (9th Cir. 1985).

B. Substantially Identical Claims Are Pending in the District Court

The substantially identical claims in Gregorian's complaint as to which no final order has been entered in the district court (and are otherwise not yet subject to appeal) are as follows:

> Eleventh Claim: "Intentional Infliction of Emotional Distress Against Defendants Izvestia, V/O Medexport, V/O Licensintorg, Ministry of Foreign Trade and Union of Soviet Socialist Republics." Incorporates the "libel" claim and alleges that, *inter alia*, "libel" invaded Gregorian's "mental and emotional tranquility." [CR 2, pp. 22-23]
>
> Fourteenth Claim: "Against Defendants USSR, Ministry of Foreign Trade, V/O Medexport, V/O Licensintorg, Mine Safety, Catalyst, Kulp and Schneider for Civil Conspiracy." Incorporates the "libel" claim and alleges that all the listed defendants conspired among themselves to terminate Gregorian's accreditation in the USSR, and "did the acts and things herein alleged" in furtherance of the conspiracy. [CR 2, pp. 24-25]

Defaults were entered as to the foreign state defendants in the above claims in August 1985. [CR 25 and 28]. Gregorian dismissed as to the Fourteenth Claim against the foreign state defendants on August 30, 1985 [CR 29], but continued to press the claim against the domestic defendants, alleging that they had conspired with the foreign state defendants, who had "libeled" Gregorian in furtherance of the conspiracy [CR 2, pp. 24-25]. On October 7, 1985 the district court found that plaintiffs "had not established a right to relief" sufficient to enter a default judgment under 28 U.S.C. § 1608 as to the Eleventh Claim [Transcript of October 7, 1985]. However, no order of any kind as to that claim has ever been entered by the district court, the default has not been vacated, plaintiffs have not dismissed, and the claim is still pending. On December 31, 1987 the district court granted summary judgment against Gregorian on the claim that the foreign and domestic defendants had conspired to remove Gregorian's accreditation and that the "libel" was in furtherance

of that conspiracy (Fourteenth Claim). The district court found that the evidence in support of such a conspiracy was "insufficient as a matter of law." [CR 182a and 188]. On March 28, 1988 the district court *refused* to certify the summary judgment order on the conspiracy/libel claim as final pursuant to Rule 54(b) [CR 190].

Thus, two identical claims are still pending in the district court. The Eleventh Claim ("intentional infliction of emotional distress") is asserted against the same parties, and explicitly is based on the "libel" claim [CR 2, p. 22]. On its face, the claim of "intentional infliction of emotional distress" raises the identical issues of fact and law as are presented by this appeal. The claim that the "libel" was in furtherance of a conspiracy to remove Gregorian's accreditation (Fourteenth Claim), is the identical claim asserted in this appeal in the fanciful "Statement of Facts" in the Opening Brief on Behalf of Appellants ("Greg.O.Br."), p.5. Future review of the district court's December 31, 1987 holding that there is insufficient evidence "as a matter of law" to sustain the conspiracy claim, would necessarily overlap review of plaintiffs' assertion of such a conspiracy as a "fact" in this appeal.

C. The Rule 54(b) Certification Was an Abuse of Discretion Because the Same Issues Shall Have to Be Decided More Than Once If There Are Subsequent Appeals

The panel of this Court that dismissed the first attempt of Gregorian improperly to appeal the dismissal of the "libel" claim, cited to *Frank Briscoe Co., Inc.* v. *Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985). The skip cite is significant: the *Briscoe* court, 776 F.2d at 1416, forcefully reiterated the Ninth Circuit rule stated in *Morrison-Knudsen Co., Inc* v. *Archer*, 655 F.2d 962, 965 (9th Cir. 1981) that "[a] similarity of legal or factual issues [still pending before the trial court] will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only where necessary to

avoid a harsh and unjust result, documented by further and *specific* findings." *Briscoe, supra*, 776 F.2d, at 1416 (emphasis added).

The district court ignored this guidance. In its December 18, 1987 Rule 54(b) order, there are no "specific" findings, only the repetition of the formula that "the adjudicated and unadjudicated claims are based upon substantially different factual and legal issues" [CR 180]. In the face of the pending "intentional infliction of emotional distress" claim, and the refusal of the district court to certify as final its dismissal of the "conspiracy" claim, only "further and specific findings" could possibly have provided a basis to sustain the Rule 54(b) order on appellate review. None were made.

The Supreme Court has carefully set out the standard of appellate review of a district court order under Rule 54(b) for abuse of discretion in *Curtiss-Wright Corporation* v. *General Electric Company*, 446 U.S. 1, 4-11 (1980). That standard is "the interest of sound judicial administration." *Id.*, at 10. And the central question to be determined is "whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once if there were subsequent appeals." *Id.*, at 8.

In light of the teaching of the Supreme Court in *Curtiss-Wright*, there can be no question but that the district court abused its discretion in certifying the "libel" claim for appeal under Rule 54(b). On appeal, plaintiffs base their primary argument that the "libel" was "commercial activity" on the allegation that it "disrupted business activities between the American companies." Greg.O.Br., pp. 16-17, and that the "libel" was a conspiratorial result of Gregorian's "pursuit of contract claims against the defendants." *Id.*, p. 20. The pending conspiracy claim [CR 2, pp. 24-25] alleges that the "libel" was in furtherance of a conspiracy to disrupt business activities between the American companies and "to avoid [defendants] contractual obligations with CIT." Plaintiffs base their secondary argument on the contention that the "libel" alleged was not "defamation" and if called by

another name ("trade disparagement" etc.), "it is really not 'libel' at all" and escapes the bar to libel actions of 28 U.S.C. § 1605(a)(5)(B). Greg.O.Br. p. 26. The pending "intentional infliction of emotional distress" claim [CR 2, pp. 22-23] alleges that the supposed "libel" is a separate cause of action in tort. Amicus Washington Legal Foundation even makes the argument in *this* appeal that if the libel be viewed as "intentional infliction of emotional distress" it would escape the bar to libel actions of 28 U.S.C. § 1605(a)(5)(B). Brief *Amicus Curiae* of the Washington Legal Foundation ("WLF Br."), p. 21. Thus, Gregorian shall present the same issues he raises here to some other panel of this Court when the district court's resolution of the "conspiracy" and "intentional infliction of emotional distress" claims become final and appealable. This improper result is the product of a clear abuse of discretion, and should not be permitted "in the interest of sound judicial administration." *Curtiss-Wright, supra*, 446 U.S., at 10.

STATEMENT OF ISSUES PRESENTED

I. Whether Congress intended to create a double standard that would deny immunity to foreign sovereigns on claims of libel where the United States is immune, despite the explicit preservation of immunity on claims of libel in the Foreign Sovereign Immunities Act.

II. Whether the act of state doctrine prohibits judicial inquiry into the accuracy of, or motivation for, publication in an official foreign government newspaper of the reasons for an official decision of a foreign government ministry.

STATEMENT OF THE CASE

Izvestia is the organ of the Soviets of Working People's Deputies, published by the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics (*i.e.*, the Soviet legislature). Plaintiffs concede its sovereign status. 658 F. Supp., at 1232 n.6.

On November 10, 1984 Gregorian was notified by the Protocol Service of the Ministry of Foreign Trade of the USSR that CIT's

accreditation to maintain a business office in the USSR was discontinued by decision of the Ministry of Foreign Trade, due to the violation of the Statute on the Order of Opening and Activities for Foreign Firms, Banks and Organizations and their Representatives [CR 31, pp. 18-19].

On November 18, 1984 Izvestia published an article by P. Dmitriyev entitled "Duplicitous Negotiator: A Story About a U.S. Firm and an Abuse of Trust."[21] The article sets out the reasons for Gregorian's loss of accreditation to conduct his business inside the Soviet Union; its conclusion states: "Therefore, the Soviet side's decision to end the activity of the CIT office in Moscow is entirely understandable. The duplicitous negotiator from America has betrayed the trust of his Soviet partners." In summary, Gregorian was stripped of his accreditation because 1) he had engaged in what appeared to be intelligence gathering activities unrelated to commercial activities; 2) he had engaged in unethical business practices, such as billing for undelivered goods as if they had been delivered, 3) he had engaged in the criminal activity of bribery and attempted bribery of the Soviet officials with whom he dealt; 4) he had engaged in the criminal activity of smuggling antiques [CR 2, Exhibit F].

Plaintiff introduced materials indicating that a Soviet citizen (Barashkov) had been convicted of accepting bribes from Gregorian and CIT in order to conclude two profitable contracts, and that Gregorian had confirmed in court giving fur coats, etc. to Barashkov. And a second Soviet citizen (Chirvinsky) had also been convicted on September 28, 1984, of taking bribes from Gregorian and CIT. [CR 108, Exhibit "A" pp. 14-15].

Cross-Appellees V/O Medexport and V/O Licensintorg moved on December 4, 1986 to vacate and set aside the default judgment previously entered against them on the "libel" claim and to dismiss the claim [CR 78]. The district court granted the motion by order of April 5, 1987 [CR 141].

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21. The Izvestia article appeared as Exhibit I to plaintiffs' complaint [CR 2]. The accuracy of the translation is not conceded, but as it was the basis for the district court's rulings it shall be taken as if it were accurate for the purposes of this appeal. All references to the article are to translation at CR 2, Exhibit I.

ARGUMENT

STANDARD OF REVIEW

The distict court's determination that it was without jurisdiction under the FSIA as to the "libel" claim is reviewed *de novo*. *Thos. P. Gonzalez, supra*, 614 F.2d, at 1256.

I.
THE UNITED STATES IS IMMUNE IN THE COURTS OF THE UNITED STATES FROM SUIT FOR LIBEL: A FOREIGN SOVEREIGN IS NECESSARILY ALSO IMMUNE

Plaintiffs do not dispute that the United States is immune from suit for libel in the courts of the United States, but argue that the FSIA can be interpreted so as to remove the immunity of foreign sovereigns from suit for libel, and that Congress deliberately intended to create such a double standard. Greg.O.Br., pp. 10-24. This improper result is inconsistent with precedent (and supported by none), and inconsistent as well with the terms of the FSIA, its legislature history, and international law.

A. Interpretation of Section 1605 To Eliminate The Express Provision of Immunity for Libel Is Inconsistent With the Established Appellate Interpretation of the Section

The FSIA provides a general jurisdictional immunity for foreign states. 28 U.S.C. § 1604. The general jurisdictional immunity is then made subject to the specified exceptions in Section 1605. The exception to immunity is then made subject to "exceptions to the exception." *MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987). That is, general jurisdictional immunity is restored (or preserved) as to certain specified "claims" as follows:

> (A) any claim based upon the exercise or performance or failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

> (B) any claim arising out of malicious prosecution, abuse of process, *libel*, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605(a)(5)(A) and (B).

This is the sole reference to libel in the FSIA, and bars the action; nevertheless, plaintiffs' primary argument is that § 1605(a)(5)(B) must be interpreted to bar only a libel that a plaintiff was incapable of pleading to be "connected with commercial activity." Greg.O.Br. pp. 17-21. There has never been a reported case of libel that creative counsel could not have pleaded to be "connected with commercial activity." The established canon of interpretation of Section 1605(a)(5) prohibits this absurd result.

The "exceptions to the exception" of § 1605(a)(5)(A) and (B) were intentionally modeled on the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a) and (h). House Report, at 6620. The phrasing of the two statutes "is virtually identical." Greg.O.Br. p. 22. It is settled law that the application of § 1605(a)(5)(A) and (B) is determined by the interpretation given to the FTCA provisions on which it was based. "To determine the scope of [Section 1605(a)(5)(A)] of the FSIA, we therefore turn to the interpretation given the similar FTCA provision." *Olsen by Sheldon* v. *Government of Mexico*, 729 F.2d 641, 646-7 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984). Accord *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385, 1398-9 (5th Cir. 1985) ("misrepresentation" claim based on failure to honor check barred by § 1605(a)(5)(B));[22] *MacArthur Area Citizens Ass'n, supra*, 809 F.2d, at 921-2. Plaintiff does not dispute that the libel claim would be barred by the FTCA even if it were "in connection with" commercial activity. By the construction of § 1605(a)(5)(A) and (B) adopted by this Court and by every other court of appeal to have considered the

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22 Compare the "commerciality" (Greg.O.Br. p. 17) of refusing to honor a check with the publication in an official newspaper of the reasons for official action.

question, the district court correctly decided that a foreign sovereign is immune as to claim of "libel" by the express terms of § 1605(a)(5)(B).[23]

Plaintiffs advance three further arguments in support of their interpretation of § 1605(a)(5)(A) and (B): 1. Congress intended to create a double standard; 2. The "libel" alleged in the complaint is really some other tort and therefore not excluded under § 1605(a)(5)(B); and 3. there is no sovereign immunity for libel under international law. These arguments are insubstantial, and can be addressed summarily.

B. Congress Did Not Intend to Create a Double Standard

There is nothing in the legislative history to suggest that Congress intended to create a double standard subjecting foreign sovereigns to suit on claims for which the United States is immune. To the contrary, in addition to Section 1605(a)(5)(A) and (B), numerous other sections of the FSIA were explicitly intended to provide in domestic courts the same treatment for foreign sovereigns as is accorded the United States.[24]

Congress intended in the FSIA to attempt to depoliticize litigation against foreign states, not to create new sources of irritation in the foreign relations of the United States. House Report, at

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23 Plaintiffs contend that the purpose of § 1605(a)(5)(A) and (B) is "unclear". Greg O Br p 22 n 4. To the contrary, § 1605(a)(5)(A) and (B) is one of the few sections of the FSIA where Congress provided clear and unambiguous guidance to the courts. Not only is foreign sovereign immunity preserved as to specifically listed claims, but the language is taken directly from a statute in existence for a generation with a well-developed history of judicial interpretation. "'[W]hen a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase' (citation omitted)." *Long v. Director, Workers Compensation Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985). As Gregorian's claims would indisputably be barred under the FTCA, so they are barred by the identical language of the FSIA.

24 28 U.S.C. § 1330(a) (exclusion of jury trials), see House Report at 6611. 28 U.S.C. § 1605(b) (maritime liens), see House Report at 6620. 28 U.S.C. § 1608(d) (time to answer or reply), see House Report at 6624. 28 U.S.C. § 1608(e) (default judgments), see House Report at 6625.

6634. The adoption of a two-faced standard, granting immunity to the United States while denying immunity to foreign states, could only be perceived as crude hypocrisy. This result would be a source of irritation in the foreign relations of the United States. Such intent should not be attributed to Congress by obscure implication.

C. Libel However Pleaded Is Barred

Plaintiffs argue that their libel claim could more properly be called by various other terms and therefore is not barred by § 1605(a)(5)(B). Greg.O.Br. pp. 25-28. As explained above, no reason exists to adopt an interpretation of § 1605(a)(5)(A) and (B) different from the established interpretation of the identical FTCA provisions. *Olsen by Sheldon, supra*, 729 F.2d. at 646-7. Under the identical FTCA provision, "claims for 'injurious falsehood,' 'disparagement of property,' 'slander of goods,' or 'trade libel' are 'claims arising out of . . . libel'" and are barred. *Art Metal—U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985).

It is argued by amicus Washington Legal Foundation that plaintiffs' libel claim is more properly analogized to a claim of "intentional infliction of emotional distress," and therefore escapes the bar to "claims arising out of libel" in the FSIA and FTCA. WLF Br. p. 21. Of course, plaintiffs' claim of "intentional infliction of emotional distress" [CR 2, pp. 22-23] is pending in the district court. No matter. The point was disposed of by a unanimous Supreme Court; a claim otherwise barred as "libel" cannot be resurrected by pleading the claim as "intentional infliction of emotional distress." *Hustler Magazine* v. *Falwell*, 108 S.Ct. 876 (1988).

D. Sovereign Immunity as to Claims of Libel Is Universally Recognized Under International Law

Plaintiffs argue that while under domestic law the United States is immune on a charge of libel, the FSIA codified international law which does not so provide for sovereign immunity

They argue that the FSIA was "designed to be consistent with the *European Convention on State Immunity and Additional Protocol*, 1972, Council of Europe, No. 74 . . ." Greg.O.Br. p. 23. Article 11 of the *European Convention on State Immunity*, however *preserves* immunity in tort except as to cases involving physical injury ("injury to the person or damage to tangible property"). *Materials on Jurisdictional Immunities of States and Their Property*, U.N. Doc. ST/LEG/SER.B/20 (1982), p. 159. The Special Rapporteur of the International Law Commission of the United Nations, commenting on this language, stated that it "does not cover cases where there is no physical damage. Damage to reputation or defamation is not personal injury in the physical sense." *Official Records of the General Assembly, Thirty-Ninth Session*, Supplement No. 10 (A/39/10), p. 157, United Nations, New York, 1984. In the view of this authoritative source, even the minority of States that have adopted the so-called restrictive theory of sovereign immunity [A-7], preserve immunity on claims of defamation.

Plaintiffs fail to cite a decision of any court in the entire world (including the United States), that has asserted jurisdiction on a claim of libel against a foreign sovereign. In the face of the explicit preservation of immunity as to "any claim arising out of . . . libel" of Section 1605(a)(5)(B), this Court should not permit itself to be misled by reference to imaginary "current principles . . . under international law." Greg.O.Br. p. 24. The double standard urged by plaintiffs is an affront to international law. "In the field of international law, where no single sovereign reigns supreme, the Golden Rule takes on added poignancy." *De Sanchez v. Banco Central de Nicaragua, supra*, 770 F.2d, at 1398.

II.

THE ACT OF STATE DOCTRINE BARS THE CLAIM. UNITED STATES COURTS WILL NOT PASS JUDGMENT ON THE PUBLIC ACTS OF A FOREIGN GOVERNMENT DONE IN THE FOREIGN COUNTRY.

Correctly rejecting the all-inclusive interpretation of Section 1605(a)(2) on which plaintiff here relies, the district court noted that "such interpretation would invite courts to pass judgment on the public acts of a foreign government so long as they were based on commercial disputes." 658 F.Supp., at 1237. While perhaps not recognized by the district court, this accurate observation is a literal rendition of the act of state doctrine in its "classic" statement: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). "The act of state doctrine declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *International Association of Machinists (IAM)* v. *OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981). Inquiry into the motives for foreign government action is barred by the act of state doctrine. *Hunt* v. *Mobil Oil Corporation*, 550 F.2d 68, 76 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

Gregorian demands the adjudication in a United States court of the question whether he, in fact, engaged in bribery, contraband, and unlawful intelligence-gathering activities while inside the Soviet Union. But the article he disputes is an official account of the reasons for official action. In the district court, plaintiffs themselves introduced evidence that two of Gregorian's business partners had been convicted in Soviet courts of receiving bribes from CIT [CR 108, Exhibit "A", pp. 14-15]. The inquiry demanded in the "libel" claim necessarily involves adjudication of the legitimacy and propriety of official Soviet governmental acts, and is barred by the act of state doctrine.

Comparison with *Hunt, supra*, is instructive. There, the allegation of a conspiracy (solely involving *non-governmental* "conspirators") was found non-justiciable because it would require inquiry into the motivation for the action of a foreign sovereign. 550 F.2d, at 76. Here, the libel claim is premised on an allegation of conspiracy among the foreign state defendants themselves [CR 2, ¶ 69], and is yet more clearly non-justiciable.

Commercial activity of a foreign state is not relevant to an act of state determination; "[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immmunity." *IAM, supra*, 649 F.2d at 1360. Nor does the FSIA limit or affect the scope of the act of state doctrine. *Id.*, 649 F.2d at 1359. Rather, the act of state doctrine remains a part of our jurisprudence in order to prevent an affront to the sovereignty of a foreign state of the precise quality that the "libel" claim represents.

This court has stated that the potential for interference with the foreign relations of the United States is the "touchstone" for non-justiciability pursuant to the act of state doctrine. *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976); *IAM, supra*, 649 F.2d at 1360. Applying that standard, the "libel" claim was properly dismissed.

CONCLUSION

The order of the district court dismissing the "libel" claim should be affirmed.

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES
Attorneys For Appellant/Cross-Appellees
845 Third Avenue
New York, New York 10022
(212) 759-4600

MARTIN POPPER
JOHN MAGE
Of Counsel

Dated: April 20, 1988

NINTH CIRCUIT RULE 28-2.6 STATEMENT

No related case is pending in the Ninth Circuit.

WOLF POPPER ROSS WOLF & JONES

By: MARTIN POPPER

Dated: April 20, 1988

ADDENDUM

INTERNATIONAL LAW COMMISSION
Thirty-fifth session
Geneva, 3 May-22 July 1983.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Memorandum presented by Professor N. Ushakov

The International Law Commission has made a substantial contribution to codification and progressive development of international law. As its many years of experience testify, successful solutions to the tasks before the Commission call for thorough and all-round examination of the problems under consideration and for the identification of universally recognized norms of international law open to codification on the basis of international State practice, decisions of international judicial bodies, and international legal writings. It is also indispensable to take due account of the fundamental principles of contemporary international law, in particular those embodied in the Charter of the United Nations, inasmuch as these are predominantly of a peremptory character.

All this, of course, also applies to the topic of jurisdictional immunities of States and their property, since the questions considered within its framework touch upon the fundamentals of international law.

Between 1979 and 1982 the Special Rapporteur, Ambassador S. Sucharitkul, submitted to the Commission four reports in which he strove to follow the Commission's customary approach, as described above, to the problem under consideration. They are of substantial interest and contain a wealth of material.

However, a number of the Special Rapporteur's conclusions do not seem to us to be well-founded. More particularly, this applies to the Special Rapporteur's view concerning allegedly emerging general trends in favour of the concept of "limited" or "functional" State immunity.

This concept or theory runs counter to the basic principles of international law and is rejected by many States, a fact to which

we have repeatedly drawn the attention of members of the Commission in our statements. Consequently it cannot, in our view, form the basis for the codification of rules on immunities of States and their property. Our opinion is based on the following considerations.

1. The principle of immunity of the State from foreign jurisdiction is a universally recognized principle in international law. This proposition has become so firmly rooted in international law that it is unreservedly recognized by all States without exception, *inter alia*, in the practice of their judicial organs and also in the international legal practice of all countries without exception.

Even those States which have recently espoused the theory of "functional immunity" recognize and affirm the principle of immunity of the State from foreign jurisdiction. In cases where they follow the theory of "functional immunity", a waiver of immunity is based on the fact that in the case in question the State allegedly was not acting as a State (a sovereign bearer of State power) but as a private individual.

It is also universally and indisputably recognized that State immunity is based on fundamental principles of international law, in particular the principles of the sovereignty and sovereign equality of States.

From State sovereignty as the inalienable attribute of every State, from the sovereign equality of States and their mutual independence, it unquestionably follows that no State can exercise its jurisdiction, i.e. its power, over other States. This is what is meant in international law by the principle of State immunity, the essence of which is precisely the non-subordination of one State to the power of another State.

Thus, State immunity exists as a consequence of the sovereignty of States for as long as they remain sovereign States. It does not depend on any transitory conditions or on transitory circumstances, including any development of the functions of States.

In the context of the principle of immunity of States from foreign jurisdiction, the term "jurisdiction" signifies, in our opinion, the sphere of sovereign power of the State—legislative, executive, judicial or other. This is also the meaning of the term as employed in the majority of international multilateral conventions.

The principle of State immunity from foreign jurisdiction is today part of the basis of many multilateral codification conventions relating to various spheres of international relations. And, in a certain sense, all these are interrelated.

At the present stage in its work, the Commission has decided to limit its task to "immunities of States and their property from the jurisdiction of courts of another State", i.e. to judicial State immunity, a limitation which is entirely admissible. However, the Commission cannot disregard the way in which this problem is resolved in existing conventions.

In particular, article 31 of the 1961 Vienna Convention on Diplomatic Relations provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction in all cases where he is acting on behalf of the sending State. In other words, the Convention proceeds from the principle of full State immunity, in particular with regard to the court jurisdiction of another State. Similar provisions are to be found in other conventions. They are well known.

By mentioning them, we wish to emphasize that the principle of the immunity of States does not lend itself to differing applications or interpretations.

2. As already mentioned, the principle of State immunity is indisputably a universally recognized principle of international law that expresses and affirms the sovereignty of States in international relations.

However, the question is sometimes raised whether the granting of immunity to a foreign State does not lead to a limitation on

the sovereignty of the State granting such immunity. The Special Rapporteur, too, has raised such a question with respect to the judicial immunity of States.

But such a question can be raised only from the point of view of the concept of so-called "absolute sovereignty", upheld in the past by certain authors who proceeded from the view that a State is not bound by anything in its relations with other States and establishes the order of its relations with other States exclusively as it deems fit. Such a view of sovereignty leads quite logically to the conclusion that only one State can be recognized as sovereign, for the sovereignty of any other State, by the very fact of its existence, means a limitation on the absolute sovereignty of the first State.

Such a concept leads, in fact, to recognizing the sovereignty of only the most powerful State, to reducing sovereignty to relations of force, and to denying the sovereignty of all other States.

In reality, State sovereignty is regarded as an inalienable attribute of every State. The boundary of real sovereignty lies in the sovereignty of all other States. International obligations voluntarily and mutually undertaken by States to respect the sovereignty of other States, including the obligation of every State to respect the immunity of other States within the sphere of its jurisdiction, is not a limitation on sovereignty but an affirmation of such sovereignty as a fundamental universal principle of international relations.

That is precisely why strict observance of the principle of State immunity from foreign jurisdiction is so important in ensuring respect for the sovereignty of all States and for each and every State.

By respecting the immunity of other States, each State expects respect for its own immunity by those other States.

It should also be noted that immunity from foreign jurisdiction by no means signifies that the State enjoying immunity may ignore the law of another State within that other State's sphere of jurisdiction. On the contrary, it is under an obligation strictly to abide by the other State's internal law. In particular, it may only

perform such acts within the sphere of jurisdiction of another State as are permitted by the latter. Each State is also under an obligation not to interfere in the other State's domestic affairs.

3. As pointed out above, all States without exception, and also the international legal doctrine of all countries, unreservedly recognize the principle of the immunity of States from foreign jurisdiction.

However, certain States as personified by their judicial organs have in a number of cases, especially in recent decades, begun to proceed in their activities from the concept of so-called "functional immunity". The essence of this concept lies in the affirmation that the State, depending on the functions performed by it, may allegedly act in different capacities and, accordingly, may either enjoy or not enjoy immunity. This theory is sometimes also described as the theory of "limited" or "relative" immunity.

In recent years, certain States have also adopted legislation derived from this concept. In particular, this obviously applies to the United States Foreign Sovereign Immunities Act of 1976.

According to the concept of "functional immunity", a distinction should allegedly be drawn between State acts which are manifestations of State or public power (*jure imperii*) and State acts which are of a private or commercial nature (*jure gestionis*). In other words, the distinction is between State activity of a "public law" nature and State activity of a "private law" nature.

However, the above concept is clearly unsound for many reasons.

First of all, it is not in keeping with modern international law, which proceeds from the sovereignty and sovereign equality of States in all spheres of their mutual relations—political, economic (trade), social, scientific, technical, cultural and other. In its foreign relations, the State always acts as *imperium* (State power), i.e. as the bearer of State of public power.

The State is a single entity, it cannot be split up, and State power is likewise a single entity. All State organs and missions act on behalf of State power within the limits of their rights and obligations as established by the State. No single State organ

can be excluded from the general system or treated in isolation from or in opposition to other organs. The joint competence of State organs covers all powers required for the performance of the State's functions.

Lastly, in particular a State's trade missions, if any, act, as do its other organs, on behalf of the State and they enjoy immunity from foreign jurisdiction.

The economic activity or economic function of a State, including so-called State trading or commercial activity, are no less important to any State, including States with a capitalist economy, than its other functions. The State does not perform economic activities as a private individual, but precisely as a State, a sovereign bearer of public power.

A State sector of the economy now appears to exist in every country. In socialist countries, the State sector of the national economy is predominant. For these States, the economic function of the State (in the USSR it is described as the economic and organizational function) has become one of the most important. In many newly independent States which have thrown off the colonial yoke, the State sector of the economy is being developed more and more.

Thus, there are absolutely no grounds for pinpointing so-called State commercial activity and setting it apart as something that is not related to State activity.

The same may be said, with equal certainty, of the separation of State activity into activities under public and private law respectively.

So far as the socialist countries are concerned, it is altogether meaningless to speak of their activities under "private law".

Even in the case of capitalist States, there are no norms or criteria on the basis of which the State's public law and private law activities can be separated. For this reason, the court practice of those States which attempt to apply the theory of functional immunity is extremely variable, contradictory and inconsistent.

Furthermore, it is generally inadmissible that a court should engage in an examination of the activity of a foreign State and should qualify it in one way or another contrary to the views of that State itself. This represents inadmissible interference in the domestic and external affairs of States.

Lastly, certain interpretations of the concept of functional immunity liken the State to natural persons, yet deny the State immunity in respect of such acts as are allegedly accessible to private individuals. However, this too is radically wrong.

In concluding a transaction in civil law, a State acts not as a juridical person but as a special subject of civil law. And in this case it acts not in the interests of the personal profit of any private individual but in the interests of the State, of the economic and social development of its society, its people. Hence there are no grounds whatsoever for likening State acts to the acts of juridical persons.

Consequently, the theory of "functional immunity" is, in our view, clearly unsound. It is directed towards the subordination of one State to the judicial power of another State, something which radically contravenes the principles of the sovereignty and sovereign equality of States and of non-interference in their domestic and foreign affairs.

4. As for the position of States, this is, we believe, incorrectly reflected or incorrectly interpreted in the Special Rapporteur's report.

Many States, possibly a majority of States, do not subscribe to, or they reject, the concept of functional immunity. Hence it is clearly mistaken to speak of any general trend emerging in favour of that concept.

Thus, of the 29 States which, in accordance with the Commission's request, sent replies to the appropriate questionnaire, 14 grant full immunity and four have no relevant legislation or practice.

The same follows from discussions on the appropriate sections of the Commission's reports in the Sixth Committee of the General Assembly, which shows that a large group of States is opposed to the above-mentioned concept.

As we have pointed out in the Commission, reference may be made to the court practice of certain States only in the cases where the State whose immunity is not recognized by the court consents thereto. It seems to us that in the majority of cases States have lodged protests in this respect. In any event, the reaction of States to court decisions is not reflected in the Special Rapporteur's reports.

The Special Rapporteur is clearly mistaken when, in particular, he interprets the treaty practice of the USSR and other socialist countries as practice allegedly testifying to the fact that immunity does not apply to State commercial activity.

The treaty practice of the USSR testifies to the opposite. Under many trade treaties, the USSR has voluntarily consented to its trade missions being placed under foreign court jurisdiction in connection with transactions concluded or guaranteed by the trade mission in the country concerned. But beyond the limits of such voluntary consent on the part of the USSR, its trade missions enjoy the immunity from foreign court jurisdiction to which they are entitled as organs of the State.

Again, generally speaking, since the 1930s the Soviet Union has not, in practice, concluded trade transactions with foreign natural or juridical persons. Such transactions are concluded by Soviet foreign trade associations and other juridical persons under national law, which, as such, enjoy no immunity from foreign jurisdiction.

Thus, the position and practice of States are by no means unambiguous. No conclusion whatever can be drawn from them concerning what is said to be an emerging trend in favour of the concept of limited immunity. At the very least, the matter calls for further in-depth study.

5. The Special Rapporteur's view that, in contemporary writings, i.e. among authors living today, there are no adherents of

absolute or complete State immunity and that opinion is allegedly universally in favour of a limitation on the immunity of States in respect of their trading or commercial activity is, to our mind, also erroneous.

First of all, Soviet international legal writings are firmly and unanimously in favour of full State immunity from foreign jurisdiction because of the sovereignty, independence and equality of States. Concepts of functional immunity and other theories of limited immunity are subjected to profound criticism that reveals their theoretical unsoundness. We ourselves have devoted some attention to this subject in our work published in 1963 under the title *Sovereignty in contemporary international law*. The situation is the same, we believe, in the international legal writings of other socialist countries.

International legal scholars in western countries are also far from unanimous on this matter. Many western authors have written or are writing against the concept of functional immunity and other theories of limited sovereignty. Allow me to refer to just one example—a work by Ian Brownlie, entitled *Principles of Public International Law*, second edition, Oxford, 1973.

After referring to some arguments by authors in favour of the concept of limited immunity, I. Brownlie states that: "These arguments have some force, but on closer examination they are seen to be in varying degrees inconclusive. In the first place the approach of many jurists to the 'sovereign in the market place' is based on conceptions concerning the role of the State and the significance of State ownership which are inapplicable even to many modern capitalist economies. It is this political aspect which makes it difficult to find a rationale for a restrictive principle: as it has been pointed out, economic activity of the State remains State activity. Indeed, from this point of view it would be more logical to do away with the immunity.".

A little further on, the author writes: "Neither the evidence of State practice nor the arguments from principle justify the replacement of the wider principle of immunity by some other

principle, and in fact the search for an alternative has so far failed."

This is the situation with regard to legal writings.

6. It is sufficiently obvious that attempts to subordinate one State to the judicial power of another State merely lead to unnecessary contradictions and friction between States. At the same time, respect for the immunity of foreign States is in no sense an obstacle to the development of mutually advantageous international trade relations, *inter alia* between States with different social systems.

Every State has opportunities to protect its interests adequately, *inter alia* in the sphere of its court jurisdiction.

First, a State may prohibit its natural or juridical persons from concluding transactions with foreign States.

Second, it may obtain by treaty the consent of the other State to submission to local jurisdiction in a specific category of matters.

Third, it may stipulate that its natural or juridical persons may conclude transactions only on the condition that their contract with a foreign State includes a provision concerning the settlement of disputes by a court or commercial tribunal.

The State reserves the right of diplomatic protection of its natural or juridical persons in appropriate cases. Other possibilities are also available.

7. The foregoing demonstrates that codification based on concepts of limited sovereignty would be clearly unsound and unfruitful.

The problem requires, at the very least, further study in greater depth.

Court of Appeals
Docket No. CA-88-5562
District Court Docket
No. CV 85-0100-KN

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAPHAEL GREGORIAN and
CALIFORNIA INTERNATIONAL TRADE CORPORATION,
Plaintiffs/Appellants,

VS.

IZVESTIA; MINISTRY OF FOREIGN TRADE OF THE UNION OF SOVIET SOCIALIST REPUBLICS;
V/O MEDEXPORT, UNION OF SOVIET SOCIALIST REPUBLICS;
V/O LICENSINTORG, UNION OF SOVIET SOCIALIST REPUBLICS;
UNION OF SOVIET SOCIALIST REPUBLICS,
Defendants/Appellees.

Appeal From the April 5, 1987 Order
of the United States District Court
Central District of California,
Honorable David V. Kenyon, Judge.

ANSWERING AND REPLY BRIEF ON BEHALF OF APPELLANTS

KROLL & FIRESTONE
GERALD L. KROLL, ESQ.
1801 Century Park East
Suite 1500
Los Angeles, California 90067
Telephone: (213) 557-1756
Attorneys for
Plaintiffs/Appellants

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

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Court of Appeals
Docket No. CA-88-5562
District Court Docket
No. CV 85-0100-KN

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAPHAEL GREGORIAN and
CALIFORNIA INTERNATIONAL TRADE CORPORATION,
Plaintiffs/Appellants,

VS.

IZVESTIA; MINISTRY OF FOREIGN TRADE OF THE
UNION OF SOVIET SOCIALIST REPUBLICS;
V/O MEDEXPORT, UNION OF SOVIET SOCIALIST
REPUBLICS;
V/O LICENSINTORG, UNION OF SOVIET SOCIALIST
REPUBLICS;
UNION OF SOVIET SOCIALIST REPUBLICS,
Defendants/Appellees.

Appeal From the April 5, 1987 Order
of the United States District Court
Central District of California,
Honorable David V. Kenyon, Judge.

ANSWERING AND REPLY BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF ISSUES PRESENTED

I. Whether the district court correctly refused to reverse the default judgment on plaintiffs' contract claims

since its jurisdiction over these claims under the FSIA's "commercial activities" clause is indisputable.

II. Whether the district court's refusal to reverse the default under Rule 60(b)(6) was proper exercise of discretion.

SUMMARY OF ARGUMENT

The Soviets are fully familiar with FSIA litigation, as evidenced by at least four reported federal cases which predate plaintiffs' action. When joined with plaintiffs' numerous attempts, over a two year period, to resolve this matter with the Soviets, and with the fact that selected defendants appeared in this action only after plaintiffs' execution on their property, defendant's culpability is unquestionable.

The Soviet defendant's failure to raise the issue of subject matter jurisdiction below prevents them from raising it for the first time on this appeal. Even assuming arguendo that the issue is subject to appeal, subject matter jurisdiction over the contract claims plainly exists under the FSIA's commercial activities clause. Breach of a commercial contract is the most basic form of commercial activity, and the Soviet defendant's failure to pay for goods received had direct effects in the United States.

There is ample evidence in the record to support the exercise of personal jurisdiction over defendant. Moreover, the Soviet defendants may not, after judgment has been entered, attack jurisdiction by asserting the substantive legal argument that it is a separate juridical entity.

The Soviet defendant improperly devotes almost one half of its brief to a distorted presentation of the facts in an attempt to sway this Court into disregarding the issues pertinent to this appeal. Plaintiff emphatically disputes

both the propriety and the accuracy of its presentation of the "evidence" of the purported witnesses interviewed solely within the borders of the Soviet Union. Moreover, since it relates only to defendant's case on the merits, the substance of this so-called evidence is completely irrelevant to the issues on this appeal. Plaintiffs strongly object to defendant's attempt to muddy the arguments on appeal in this fashion.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY REFUSED TO REVERSE THE DEFAULT JUDGMENT ON PLAINTIFFS' CONTRACT CLAIMS; ITS JURISDICTION OVER THESE CLAIMS UNDER THE FSIA'S "COMMERCIAL ACTIVITIES" CLAUSE IS INDISPUTABLE.

A. The Soviet Defendant May Not Contest Subject Matter Jurisdiction on this Appeal Because It Chose Not to Argue the Issue Below.

In their opening brief ("Defs. O. Br."), appearing defendant V/O Medexport argues for the first time on appeal that the district court lacked subject matter jurisdiction over plaintiffs' contract claims. The appearing defendant labels "absolutely incorrect" the district court's finding that it had conceded the applicability of subject matter jurisdiction to the contract claims. Defs. O. Br. at 7 n.5. However, the record clearly shows that defendant made a deliberate choice not to dispute the issue below.

For instance, in their Memorandum of Points and Authorities in support of Their Motion to Vacate Judgment [C.R. 62], appearing defendants V/O Medexport

and V/O Licensintorg argued that the district court lacked personal jurisdiction over them, and subject matter jurisdiction over the libel claim. Argument against subject matter jurisdiction over the contract claims is conspicuously absent. Consequently, plaintiffs reasonably assumed this issue was not in dispute, and so did not address it in their Memorandum of Points and Authorities in Opposition to Motion to Vacate [C.R. 86].

Moreover, at the January 28, 1986 district court hearing, appearing defendant's attorney Martin Popper stated: "It is the position of the defendants Medexport and Licensintorg that the court lacks subject matter jurisdiction *with respect to the libel claim* and lacks in personal jurisdiction with respect to the contract claim." [Transcript of Jan. 28, 1987 at 7, lines 18-22.] (Emphasis added.) Later in that same hearing, plaintiffs' attorney noted that "the Soviets do not contest jurisdiction — subject matter jurisdiction — on the contract claims." [Transcript at 26, lines 18-19.] Defendants' counsel never disputed this statement.

Given this failure to dispute the issue, the district court's finding that defendants conceded subject matter jurisdiction over the contract claims is clearly correct. Furthermore, because a federal appellate court does not consider an issue not passed on below, appearing defendant may not now argue this issue for the first time on appeal:

> In *United States v. Patrin*, 575 F.2d 708 (9th Cir. 1978), we recognized an extremely narrow exception to the principle that a federal appellate court does not consider an issue not passed on below. We may consider an issue conceded or neglected below if the issue is purely one of law and the pertinent record has been fully developed. *This exception applies only*

> *when the party against whom the issue is raised would not be prejudiced and would not have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue.*

United States v. Gabriel, 625 F.2d 830, 832 (9th Cir. 1980) (Emphasis added).

If defendants had contested subject matter jurisdiction over the contract claims below, plaintiffs would certainly have developed new facts and advanced distinct legal arguments in response. Since appearing defendant induced plaintiffs' inaction by its failure to raise the issue, deciding it for the first time on appeal would be grossly unjust and prejudicial. Therefore, plaintiff respectfully submits that this Court should decline to consider it.

B. Even if Subject Matter Jurisdiction Were Open to Dispute, the Soviet Defendants Cannot Establish a "Presumption of Immunity" Because the Contract Claims Do Not Relate to a Public Act.

In *Meadows v. Dominican Republic,* 817 F.2d 517 (9th Cir. 1987), this Court described the procedure by which a foreign defendant must prove its immunity under the FSIA:

> where, as here, the plaintiff alleges in his complaint that his claim is based on a foreign state's strictly commercial acts, *the defendant must establish a prima facie case that it is a sovereign state and that the plaintiff's claim arises out of a public act.* This proof establishes a presumption that the foreign state is protected by immunity.

Id. at 522-523. Noting that a public activity is one which only a sovereign state can perform, (*MOL, Inc. v. Peoples Republic of Bangladesh,* 736 F.2d 1326, 1328-29 (9th Cir.

1984), *cert. denied,* 469 U.S. 1037 (1984), *Meadows* held that the Dominican Republic and one of its agencies had not engaged in public acts in connection with procuring a loan. *Id.* at 523. This is because "the term 'commercial activity' applies to an agreement that might be made by a private person, notwithstanding the fact that the goods or services to be procured through the contract are to be used for a public purpose. H.R.Rep. No. 1487, at 16." *Id.*

In the instant case, plaintiffs allege jurisdiction over defendants under the FSIA, and specifically allege that appearing defendant V/O/ Medexport is a "commercial organization which, at all times referred to herein, engaged in 'commercial activity' as defined by 28 U.S.C. Section 1603(d)." [C.R. 2 at paragraphs 2 and 7.] These allegations place the burden upon appearing defendant to prove that plaintiffs' claims against it arise out of a public act.

This the appearing defendant cannot prove. Plaintiffs' claims arise out of defendant's agreements to purchase the medical equipment plaintiffs shipped it. [C.R. 2.] A contract to purchase foods or services is presumptively commercial, though a contractual activity should not be designated as "commercial" unless it is of a kind in which a private party might engage. *Joseph v. Office of the Consulate General of Nigeria,* 839 F.2nd 1018, ____, (9th Cir. 1985) (Available on WESTLAW, ALLFEDS database). Clearly purchasing medical equipment is an activity which might be performed by a private party; private laboratories, doctors and hospitals make such purchases routinely.

Defendant therefore makes no attempt to prove "public act." Instead, it attempts to confuse the issues and hoodwink this Court into disregarding the proper immunity analysis through a misleading, selective, grossly

improper presentation of its case on the merits. *See Falk v. Allen,* 739 F.2d 461, 463 (9th Cir. 1984) (A Rule 60(b) motion should not be treated as a substitute for appeal). Defendant states, "on the facts presented by the Gorsky and Bose testimony the plaintiffs' claim does not relate to an act within any exception of Section 1605. Indeed, the district court acknowledged that the Gorsky and Bose testimony established a prima facie case." Def. O. Br. at 19. The following points reveal that this argument is, at best, nonsensical:

1. The district court never acknowledged that defendant had established a prima facie case for immunity. It merely stated that defendant had alleged facts which, if proven, would establish a meritorious defense on the merits. *Gregorian v. Izvestia,* 658 F. Supp. 1224, 1237 (C.D. Cal. 1987). This statement appears in the district court's discussion of relief under Rule 60(b)(6), and has absolutely nothing to do with immunity. Moreover, contrary to defendant's insinuation, the district court opinion never even mentions the Gorsky and Bose testimony.

2. According to defendant, the Gorsky and Bose testimony asserts that defendant had nothing to do with the contracts, that there were no contracts, that the equipment was brought into the Soviet Union for testing only, and that at least some of it had been returned. Even if this testimony were admissible evidence (see *infra*), it does not establish that plaintiffs' claims relate to public acts of defendant. Thus it does not establish defendant's claimed "presumption of immunity."

3. Defendant believes the testimony establishes that plaintiffs' claims relate to no acts of defendant, and thus to no act within the section 1605 exceptions. However, whether agreements were made and whether defendant was a party to them are substantive contractual issues

which have no bearing on the question of subject matter jurisdiction over the disputed claim.

C. Even if Subject Matter Jurisdiction Were Open to Dispute, the District Court Correctly Found It Under the FSIA's "Direct Effects" Clause.

The district court correctly found subject matter jurisdiction over plaintiffs' contract claims under the third clause of 28 U.S.C. section 1605(a)(2), which provides: "the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act caused a direct effect in the United States." The court based its finding upon the fact that the acts complained of resulted in the failure of Soviet and American banks to transfer payment from the USSR to plaintiffs in California, and that they also caused financial losses by disrupting CIT's relations with its U.S. suppliers.[1] *Gregorian*, 658 F. Supp. at 1234. In support, the district court cited *Texas Trading & Mill Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311-313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

In *Texas Trading*, the Second Circuit held that where the parties agree that money owing on a contract was to be collected in the United States, failure to pay the plaintiff creates the requisite direct effect in the United States. *Id.* In *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir. 1987), this Court applied the *Texas Trading* approach to find direct effects in a case where plaintiffs, United States residents, sued on an agreement providing for payment in the United States. Since the

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[1]Defendant falsely implies that there is no evidence in the record indicating the contracts called for payment to plaintiffs in the United States. Mr. Gregorian directly attested to this fact in his November, 1986 declaration [C.R. 86].

facts of the present case are directly analogous to those in *Meadows* and *Texas Trading*, the district court's finding of subject matter jurisdiction was correct.

Defendant argues that *Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985), and *Yugoexport, Inc. v. Thai Airways International, Ltd.*, 749 F.2d 1373 (9th Cir. 1984) dictate a finding of no "direct effect" in the present case. Def. O. Br. at 21-22. Defendant's application of these cases is plainly incorrect. In both cases the acts complained of caused immediate injuries outside of the United States, which resulted in secondary, indirect losses in this country. The contract breaches of which plaintiffs in the present case complain involve no such intervening injuries.

D. The District Court's Finding of Personal Jurisdiction Over V/O Medexport Is Correct.

1. The "Doing Business" Test May Be Applied to Determine Personal Jurisdiction Under the FSIA.

28 U.S.C. section 1330(b) provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [subject matter jurisdiction] where service has been made under section 1608 of this title." Thus, the statutory requirements for personal jurisdiction under the FSIA are fulfilled if there is subject matter jurisdiction plus service of process. *Texas Trading*, 647 F.2d at 308. Congress intended section 1330(b) to, in effect, serve as a Federal long-arm statute over foreign states. *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 660, 665 n.8 (D.C. Mich. 1985) (citing H.R.Rep. No. 1487,

94th Cong., 2d Sess. 13, *reprinted in* 1976 U.S.Code Cong. & Ad. News 6612).

"But the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over defendant." *Texas Trading*, 647 F.2d at 308. These due process requirements are satisfied if the defendant "has certain minimum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984) (quoting *International Shoe*). The weight of authority holds that for personal jurisdiction under the FSIA, the relevant question is whether the foreign state has sufficient contacts with the United States as a whole, not merely the forum state. *Kalamazoo*, 616 F. Supp. at 665. In other words, the majority holds that the general jurisdiction "doing business" test may be applied to establish the constitutionality of an exercise of personal jurisdiction under the FSIA.

This Court recently adopted the majority view. *Meadows*, 817 F.2d at 523. Thus, defendant's assertion that the "doing business" standard does not apply to an FSIA case is erroneous.

Also erroneous is its assertion that the district court erred in ignoring its separate juridical existence. In *Meadows*, this Court stated the defendants' argument "that the issue of juridical separateness goes to subject matter jurisdiction . . . is inconsistent with settled legal principles." *Id.* at 524. The Court noted that the Supreme Court held that the question of identity for purposes of attribution of liability among instrumentalities of a foreign state is a matter of substantive law. *Id.* at 524 (citing

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 620 (1983). Thus, while juridical separateness may be a defense on the merits, it is not a defense to jurisdiction. The district court correctly found that "at this stage, . . . after a judgment has been entered, issues of substantive law, such as agency, alter ego and juridical separateness are not open for consideration." *Gregorian,* 658 F. Supp. at 1236.[2]

The district court also found correctly that the present case is essentially the same as *United Euram Corp. v. Union of Soviet Socialist Republics,* 461 F. Supp. 609 (S.D.N.Y. 1978). In that case, plaintiff's allegations that its contracts with a Soviet agency required approval by its controlling Ministry, and that negotiations were conducted by officials of both entities, were sufficient to withstand defendants' motion to dismiss based upon the argument that they were separate entities. *Id.* at 612. In the present case, plaintiffs likewise allege that its dealings with the Soviet agencies required approval by the Ministry of Foreign Trade; the accreditation agreement

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[2]Defendant's reliance on *Thos. P. Gonzalez Corp. v. Consejo Nacional,* 614 F.2d 1247 (9th Cir. 1980), and *Schmidkunz v. Scandinavian Airlines System,* 628 F.2d 1205 (9th Cir. 1980), is misplaced because both cases are distinguishable. In *Thos. P. Gonzalez* the separate entities argument is not addressed, and the court defendant did not have sufficient contacts to justify general personal jurisdiction. Moreover, the court's denial of specific personal jurisdiction was based on "the crucial fact" defendant made no visit to the forum pertaining to the transaction at issue. *Id.* at 1254. In this case, plaintiff has offered proof that defendant visited California in connection with contracts at issue. Memorandum of Points and Authorities in Opposition to Motion to Vacate [C.R. 86 at 19-22.] In *Schmidkunz,* there was no nexus between the injury, which occurred in Copenhagen, the defendant, a Dutch corporation, and the plaintiff, a United States resident. Since the present case involves direct effects in the United States, a sufficient nexus exists.

(Exhibit E to the First Amended Complaint) explicitly states relations between foreign businesses and Soviet agencies "must be channelled through the USSR Ministries." [C.R. 2 at paragraphs 6-10 and 16, and p. 49 paragraph 12.]

2. Defendant Failed to Prove Its Immunity By a Preponderance of the Evidence.

Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by the preponderance of the evidence that an exception does not apply. *Joseph*, 830 F.2d 1018 at ____; *Meadows*, 817 F.2d at 523. Therefore, defendant's repeated emphasis upon what it labels as "the uncontested facts" is completely misplaced. The district court was entitled to examine all of the evidence before it, contested or not, and decide whether defendant had proved its immunity by a preponderance of the evidence.

Moreover, just as defendant's assertion that it established a prima facie case for immunity is fallacious (see section I.B., *supra*), so too is its claim that prior controverted allegations of the plaintiffs cannot serve as a basis for jurisdiction. Defendant refers to *Meadows* as supporting this claim, but *Meadows* does not stand for the proposition. The case merely states that if defendant proves a prima facie case for immunity (which defendant did not), then plaintiff has burden of going forward — but the defendant still bears the burden of proving its case for immunity by a preponderance of the evidence. *Id.* at 522-523.

An examination of the evidence defendant submitted in support of its immunity clearly reveals its failure to meet its burden of proof. The defendant's proof consists only of an affidavit by its own attorney that defendant "maintains

no office or presence in the United States." This conclusory statement is made not upon personal knowledge, but mere information and belief. [C.R. 62 at 22.] Plaintiffs properly challenged this evidence, [Transcript of Jan. 28, 1987, p. 29 lines 19-25], and the district court could properly disregard it. Moreover, in its opening brief, defendant does not cite this declaration nor even one other piece of competent evidence in the record in support of its assertion that it has insufficient contacts with the U.S. for personal jurisdiction. Since the record contains no such evidence, the district court's finding of no immunity was entirely proper.

The only other proof defendant relies on is the testimony of former CIT employees Bose and Gorsky. Defendant notes that this testimony is "under penalty of perjury," but fails to mention that it is not made under the laws of the United States, but those of the Soviet Union. The testimony was taken by Soviet officials in the Soviet Union in the Russian language, and the copies and translations provided to the district court were never properly authenticated. Moreover, nearly all of the testimony is based not upon personal knowledge, but on surmise, conjecture, and hearsay.

More importantly, the testimony is controverted by plaintiff Raphael Gregorian's declaration executed on November 28, 1986, submitted with plaintiffs opposition to the motion to vacate. [C.R. 86.] Of course, just as plaintiff strongly questions the credibility of the Bose and Gorsky testimony, defendant doubts plaintiff's properly executed declaration. On the basis of this conflict alone, the district court was correct in finding that defendant had not proved its immunity by a preponderance of the evidence.

But most important is the fact that the Bose and Gorsky testimony does not prove that defendant had insufficient contacts with the United States for personal jurisdiction, and it does not prove that defendant's transactions with plaintiffs were public acts immune from subject matter jurisdiction. Defendant's glaring lack of proof on these key questions indicates that it cannot prove them by any evidence, much less the preponderance of the evidence.

II.

THE DISTRICT COURT'S REFUSAL TO REVERSE THE DEFAULT UNDER RULE 60(b)(6) WAS A PROPER EXERCISE OF DISCRETION.

The district court's denial of a Rule 60(b) motion must be affirmed unless the court abused its discretion in ruling that sufficient grounds for setting aside the judgment were not shown. "It is not enough to show that a grant of the motion might have been permissible or warranted; rather the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion." *Plotkin v. Pacific Telephone and Telegraph Co.*, 688 F.2d 1291, 1293 (9th Cir. 1983). If the district court had a sufficient basis for finding that defendant's default was culpable, this Court must affirm the decision even if the record shows a meritorious defense and no prejudice to plaintiff. *Meadows*, 817 F.2d at 522; *Pena v. Seguros la Comercial, S.A.*, 770 F.2d 811, 815 (9th Cir. 1985).

In the present case, therefore, even if this Court believes the district court could have excused defendant's failure to appear in this case, it must uphold the district court's judgment if, as is obvious, the court had sufficient reason to find defendant's obstinance culpable.

A. Defendant's Failure to Appear Was Culpable Because it Is Sophisticated and Experienced in FSIA Matters.

In *Meadows v. Dominican Republic*, this Court upheld the district court's refusal to reverse a default judgment against defendant where it found, based on its involvement in other actions in United States courts, that defendant was sufficiently sophisticated and experienced in the requirements of American law to protect its interests. *Meadows*, 817 F.2d at 522. Defendants in the present case are even more sophisticated and experienced in American law, and in FSIA litigation in particular. A review of the reported cases alone reveals that they have repeatedly appeared in United States courts litigating FSIA matters. *See Bland v. Union of Soviet Socialist Republics*, 17 Av. Cas. (CCH) 17,530 (E.D.N.Y. 1982); *Harris v. VAO Intourist*, 481 F. Supp. 1056 (E.D.N.Y. 1979); *United Euram v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D.N.Y. 1978); *Yessenin-Volpin v. Novosti Press Agcy.*, 443 F. Supp. 849 (S.D.N.Y. 1978). In each of these cases, the defendant was represented by Wolf, Popper, Ross, Wolf & Jones, the same counsel through which defendant appears in the present case. Thus, defendant is well aware of the requirements and procedure of the FSIA and of American law in general, and it is more than capable of using its knowledge to protect its interests.

The above demonstrates the inapplicability of *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), to the facts of this case. The *Jackson* court reversed a default judgment based on the fact that the defendant had only recently established relations with the United States, and so was unfamiliar with American law. Also, the defendant's failure to appear was based on its mistaken belief that international law did not require it to do

so. *Id.* at 1495. The court also cautioned, however, that relief under 60(b)(6) is an extraordinary remedy, which may be invoked only upon a showing of exceptional circumstances. *Id.* at 1494.

No such exceptional circumstances exist here. Defendant is well-versed in both U.S. and international law, and it was well-aware that it was required to appear to contest jurisdiction or suffer a default.

B. Defendant Had Numerous Opportunities to Respond to Plaintiff's Allegations and Settle this Dispute Before Plaintiff Was Forced to Resort to Attachment; It May Not Be Relieved From Its Deliberate Choice to Ignore the Legal Consequences of Its Inaction.

In *Plotkin v. Pac. Tel. and Tel.*, this Court found no abuse of discretion in the district court's denial of a motion to vacate where it found the defendant had made a voluntary, conscious election not to appeal a summary judgment. "Calculated, deliberate choices are not to be relieved from under Fed. R. Civ. P. 60(b)." *Plotkin*, 688 F.2d at 1293. In *Wilson v. Moore and Associates, Inc.*, 564 F.2d 366 (9th Cir. 1977), this court reached the same conclusion regarding the district court's refusal to reverse a default where there was "no doubt whatsoever" that defendant had knowledge of the litigation. *Id.* at 368. And in *Pena v. Seguros*, this court even found no abuse of discretion where it was unclear from the record whether defendant knew of the action on which he defaulted. *Pena*, 770 F.2d at 811.

In the present case, plaintiffs made extraordinary efforts to notify defendant of this action and to seek its resolution:

1. During February 1985 Gerald Kroll traveled to Moscow to meet with the Soviet defendants in an attempt to resolve the case. However, the Soviets refused to meet and those efforts on behalf of plaintiffs were effectively rebuffed.

2. During February-March 1985, Gerald Kroll sent letters to Soviet Foreign Minister Andrei Gromyko and Secretary General Mikhail Gorbachev requesting their intervention to resolve the case. A copy of the complaint was included in the letter to Andrei Gromyko. No response was ever received.

3. During October 1985, following this court's initial rulings on plaintiffs' motion for Default Judgment, Gerald Kroll spoke with Soviet Vice-Consul Oleg Tischenko about resolution of the case. However, plaintiffs' counsel never heard back from him.

4. On June 30, 1986, following this court's order for Default Judgment against the Soviet Defendants, Gerald Kroll sent a letter to Oleg Tischenko, Soviet Vice-Consul, notifying the Soviets of the court's ruling.

5. On July 15, 1986, plaintiffs' counsel was notified by the State Department that Martin Popper, Esq. of the Wolf, Popper law firm had been retained by the Soviets to consult with them concerning the judgment entered in this case. On that same date, July 15, 1986, Gerald Kroll sent a letter to Mr. Popper enclosing copies of the Order, Judgment and Notice of Entry. Further, Mr. Popper was advised that payment of the judgment by the Soviets would avoid the need for further action by plaintiffs' counsel. No response was ever received.

6. On August 28, 1986, Gerald Kroll sent a letter to Soviet Consul General Vladimir Kuleshov in an attempt

to arrange a personal meeting to discuss resolution of the case. No response was ever received.

7. After the October 14, 1986 Order for Right to Attach in Aid of Execution and to Execute on Judgment was issued by this court, plaintiffs' counsel was first contacted by the attorney representing the Soviets, Martin Popper, Esq. On October 23, 1986, Gerald Kroll and Beth Yoffie met with attorney Martin Popper at his New York office. Mr. Popper requested more time on behalf of the Soviets to discuss resolution of the case. Plaintiffs' counsel agreed to defer further action until October 29, 1986 to allow the Soviets time to make a proposal for resolution.

8. On October 29, 1986, Gerald Kroll and Martin Popper spoke by telephone. Mr. Popper had nothing to propose and only requested more time. Plaintiffs' counsel agreed to defer further action until November 7, 1986. Mr. Popper was also advised that plaintiffs expected to receive a proposal for resolution by that date.

9. On November 7, 1986, Gerald Kroll and Martin Popper spoke by telephone. Since Mr. Popper still had nothing to propose on behalf of the Soviets, plaintiffs' counsel advised him that plaintiffs would not agree to defer further action.

10. On November 13, 1986, plaintiffs' motion for an order for a supplemental right to attach order in aid of execution and to execute on judgment was hand delivered to the Soviet Consulate in San Francisco. Even though Mr. Popper and the Wolf, Popper firm had not yet appeared in the action for any party, plaintiffs' counsel mailed a copy of that motion to Mr. Popper on November 14, 1986.

[C.R. 86 at 5-8 and 32-44.]

The above establishes that the defendant was well aware of the status of this action and of plaintiffs' willingness to resolve it amicably. Therefore, defendant's obstinate refusal to appear until plaintiff was forced to resort to attachment was clearly a calculated, deliberate choice from which the district court properly refused to grant relief.

Indeed, to grant relief from such tactics would signal foreign defendants that the best response to an FSIA suit is no response. Then, if and when the plaintiff ever attempts to execute, the defendant need only rush into court and assert all of its defenses belatedly. This strategy is attractive to defendants because it creates enormous delays in the entire court process, thus postponing the day of reckoning for years. Moreover, it allows defendant to avoid discovery, and to present its case in a context where the standards are generally tilted in its favor. This strategy also allows defendants with unlimited resources to simply outlast plaintiffs. Of course, this strategy is contrary to the American court's strong policies favoring judicial economy, uniformity of practice, and finality of judgments, but as long as the courts condone it, such practices will continue.

CONCLUSION

For all of the foregoing reasons, the district court's carefully considered refusal to vacate the default judgment against the defendant was a proper exercise of discretion and must therefore be affirmed.

DATED: May 20, 1988

KROLL & FIRESTONE

By: GERALD L. KROLL
Attorneys for Plaintiffs Raphael Gregorian and California International Trade Corp.

REPLY BRIEF ON BEHALF OF PLAINTIFFS

I.

THE DISTRICT COURT PROPERLY CERTIFIED THE LIBEL JUDGMENT PURSUANT TO RULE 54(b)

Where a claim is one of statutory construction, does not deal with factual issues, and involves a novel issue likely to recur, a district court may properly find an issue sufficiently distinct to permit certification. *International U. of Elec. v. Westinghouse Elec.*, 631 F.2d 1094, 1099 (9th Cir. 1980).

The issue the district court certified for this appeal is a novel and strictly legal issue regarding proper statutory construction of the tort and commercial activities clauses of the FSIA. the question presented is, simply put, whether the libel exception applies to both clauses. There is no "substantially similar" issue in any of the remaining claims against Licensintorg or any other defendant.

The district court's certification was therefore a proper exercise of discretion.

II.

THE SOVIET APPELLEE'S ATTEMPT TO DEFEAT THE LIBEL CLAIM BY RAISING THE ACT OF STATE DOCTRINE FOR THE FIRST TIME ON APPEAL MUST FAIL

Just as they did with the contract claims, the Soviets and the State Department attempt to raise a new issue on appeal with respect to the libel claim: the Act of State Doctrine. That issue was not raised in the District Court.

Significantly, if the issue had been raised below it would have caused plaintiffs to address the libel issue differently, both in legal and factual arguments. *See United States v. Gabriel,* 625 F.2d 830. For example, the State Department's brief seizes upon *dicta* in *Yessenin-Volpin v. Novosti Press Agency*, 443. F. Supp. 849, 856 (S.D.N.Y. 1978) to fashion an argument that *Izvestia*'s functions are sovereign, purely governmental and, therefore, an act of state. However, if this issue had been raised below, appellants Gregorian and CIT would have had the opportunity to develop and present evidence about *Izvestia*'s functions — to demonstrate that publishing an article in *Izvestia* is just like articles that appear in the *Los Angeles Times* or the San Francisco *Chronicle*.

Now, on appeal the Soviet appellee and the State Department attempt to deprive appellants of the opportunity to refute their assertions, and, instead, have this court simply accept their argument that the subject *Izvestia* article was an act of state. The logical extension of their arguments would render any act of an agency of a communist state an "act of state" which would, in turn, render the FSIA meaningless.

A. Even Assuming, *Arguendo*, That The Soviet Appellee Can Raise The Act Of State Doctrine For The First Time On Appeal, *Izvestia's* Conduct Is Not An Act Of State

Izvestia, like all other newspapers of the Soviet Union, is an organ of the Soviet state. In *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978), another libel suit against the Soviet Union, the court found that both TASS and Novosti Press Agency are "organs of the Soviet state." *Id.* at 852. The court also pointed out that Novosti is " 'an information agency of Soviet public organizations . . . operating under Articles

125 and 126 of the Constitution of the U.S.S.R.' . . . These constitutional articles guaranty freedom of the press to the citizens of the U.S.S.R. *through their control of communications facilities.* (Art. 125)" *Id.* (Emphasis added.)[1] It is clear, therefore, that all newspapers of the Soviet Union are fully controlled by the government.

As such, the defendants would have this court hold that *all* the statements made in *any* Soviet newspaper, concerning anything whatsoever — commercial or not — is barred as an official, public act of a sovereign. [Soviet Brief at 48][2] Such a holding would be entirely inconsistent with the text and legislative history of the FSIA. Furthermore, it flies in the face of the Tate Letter (letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952, *reprinted in* 26 Dep't of State Bulletin 984 (1952)), and, indeed, the entire restrictive theory of sovereign immunity — *to which the United States explicitly adheres.* 28 U.S.C. section 1602; H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., 7, *reprinted in* 1976 U.S. Code Cong.

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[1]In *Yessenin-Volpin*, the Soviet's lawyer, Martin Popper, who is the attorney of record in the case at bar, informed the court that the newspapers *Soujetunion Heute, Krasnaya Zvezda, Izvestia*, and *Sovetskaya Rossiya*, are also organs of the Soviet state. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. at 856. In the British case of *Krajina v. The TASS Agency*, 2 ---- A.R. 274, 275, 3 Int'l Law Cases 246 (1949), the Soviet news agency TASS filed affidavits alleging that TASS is "the central information organ of the Union of Soviet Socialist Republics". *Id.*

[2]The United States government, in its amicus brief on behalf of the Soviet defendants, goes so far as to claim that: "Since *Izvestia* is the voice of an official Soviet agency, the determination of its contents can be carried out only by a governmental entity, thus publishing a particular article in *Izvestia* is a sovereign governmental function." [U.S. Brief at 24]

and Admin. News, 6604, 6605 ("[T]he bill would codify the so-called 'restrictive' principle of sovereign immunity.").

Both the Soviets and, ironically, the United States government have missed the mark. As this court has clearly explained, sovereign entities, under the restrictive theory of sovereign immunity as codified under the FSIA, *can* be held liable for their actions in United States courts, if "the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, *regardless of the defendant's generally commercial or governmental character.*" *Joseph v. Office of Consulate General of Nigeria*, 820 F.2d 1018, ____ (9th Cir. 1987) (quoting *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379, 5th Cir. 1980). To hold otherwise would mean that sovereign entities perform *only* public acts and, consequently, would always be immune from suit. Such an absurd result would render the entire FSIA pointless. As the district court below aptly explained: "It is not important that the actor is governmental; the question is whether the government was wearing its sovereign rather than its commercial hat at the time in question." *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1234 (C.D.Cal. 1987).

It is indisputably clear that Izvestia was wearing its "commercial hat" when it published the libel.[3]

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[3]Interestingly, the United States likens the Izvestia article to an entry in the Congressional Record, [U.S. Brief page 25], in support of its "sovereign hat" theory. The Soviets do not make such an absurd claim, they have never asserted that Izvestia is anything more than a *newspaper* published by, and part of, the Soviet state.

In any event, the question of whether Izvestia itself is immune under the FSIA for the libel claim is completely irrelevant, as *Izvestia is not a party to this appeal.*

V/O Medexport and V/O Licensintorg are the only Soviet defendants appearing in this case. Both are state trading organizations. One of the principal purposes behind enacting the FSIA was so that "socialist states and their *state corporations* cannot avoid jurisdiction under the guise of a governmental purpose." Note, *"Commercial Activity" in the Foreign Sovereign Immunities Act of 1976,* 14 J. Int'l L. & Econ. 163, 167 (1979); *see also Jurisdiction of U.S. Courts in Suits Against Foreign States; Hearings Before the Subcom. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary,* 94th Cong. 2d Sess. 56 (1976) (comments of Mr. Lee). The complaint clearly alleges that "... V/O Medexport, V/O Licensintorg ... caused to be published false and libelous accusations against Mr. Gregorian." [C.R. 2, at 19.] Therefore, whether Izvestia is immune from suit is irrelevant to the question of whether V/O Licensintorg and V/O Medexport "caused to be published" in a newspaper statements which, on their face, were clearly and explicitly both libelous and "in connection with commercial activity." Indeed, the libelous article itself asserts that "the U.S. 'businessmen' often 'forgot' ... to send clients [i.e. V/O Medexport and V/O Licensintorg] the parts stipulated in their contracts." [C.R. 2, Exhibit "F".][4]

In the instant case, Soviet state trading organizations attempted to avoid contractual commitments by causing to be published libelous statements. The Soviet argument that such conduct constitutes an "Act of State" is disin-

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[4]Ironically, these are the same contracts V/O Medexport and V/O Licensintorg are now claiming never existed. [Soviet Brief 9-15]

genuous. Moreover, insofar as the libel constituted a trade libel, it was "a particular commercial transaction or act" which is, by definition, a commercial activity. 28 U.S.C. section 1603(d). Under this definition, the appealing Soviet defendant clearly falls under the commercial umbrella.

III.

CONGRESS CLEARLY INTENDED TO APPLY THE DOCTRINE OF SOVEREIGN IMMUNITY IN A DIFFERENT WAY TO FOREIGN STATES THAN IT DOES TO THE UNITED STATES

The Soviets would have this court believe that since *some* sections of the FSIA are worded in a similar fashion to sections in the FTCA [Soviet Brief 45 fn. 24 and accompanying text], Congress *therefore* "intended to provide in domestic courts the same treatment for foreign sovereigns as is accorded the United States." *Id.* The Soviet logic is unsound. *See generally* Gregorian Opening Brief at 24-25.

Legislative history explains that section 1605(a)(5)(B) torts "correspond to *many* of the claims with respect to which the U.S. government retains immunity under the Federal Tort Claims Act, 28 U.S.C. section 2680(a) and (h)." House Report *supra*, at 6620. There is no indication in the statute, legislative history, or relevant case law that by tracking *part* of another statute, Congress intended the two statutes to be *co-extensive*.[5] To the

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[5]The United States, as amicus curiae, misapplied this court's recent holding in *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir. 1987). Amicus notes that "this court has instructed that, in interpreting the scope of the FSIA exceptions, the courts are to look to how the FTCA has been applied [U.S. Brief at 17 (citing

contrary, the statute, legislative history, and subsequent case law are *abundantly* clear that the FSIA was intended to be coextensive with the *restrictive theory of sovereign immunity* — under which sovereign entities will *always* be held liable for their commercial activities, not just the circumstances in which the U.S. government allows itself to be sued.

The Soviets contend that applying sovereign immunity to claims of libel is "universally recognized under international law," [Soviet Brief at 46] yet they can produce no cases in support of their theory. They do not refute the international statutory authorities described on pages 22-24 of plaintiffs' opening brief, with the exception of the European Convention on State Immunity and Additional Protocol. European Convention on State Immunity and Additional Protocol, 1972, *Council of Europe* No. 74, *reprinted in* U.N. Office of Legal Affairs, U.N. Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property*, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.B.10 (1982).

Joseph, 830 F.2d at 1025-1026).] Plaintiffs do not dispute that under current doctrine the 1605(a)(5)(B) exceptions are construed under the same analysis as the corresponding FTCA sections; plaintiffs dispute, however, that the court, in the case at bar, needs to interpret the scope of the exception at all. It is settled law that exceptions to 1605(a)(5) *do not become relevant* if the tort constitutes or is connected with commercial activity. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 855 ("[I]mmunity must be granted to TASS and Novosti *unless* the court finds that the acts alleged are within the scope of subsection (a)(2)."); *United Euram Corp. v. USSR*, 461 F. Supp. 609, 612 (S.D.N.Y. 1978), and the question of what body of law to apply in interpreting the subsection itself becomes moot. In fact, the government concedes this point in a footnote [U.S. Brief at 15, fn. 8.]

The Soviets, in support of their novel claim, point to Article 11 of the *European Convention* claiming that it "preserves immunity in tort except as to cases involving *physical* injury." [Soviet Brief at 47.] *Article 11 says no such thing.* The U.S. government blindly agrees with the Soviets' reading of Article 11 [U.S. Brief at 18]:

> Article 11 of the *European Convention* states: A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for *injury to the person or* damage to tangible property . . .

Both the Soviets and the U.S. government pretend that the tort of libel does not constitute "injury to the person." Furthermore, there is clearly no restriction in Article 11 as to "*physical* injury" as the Soviets purport.[6]

Even assuming, *arguendo*, that the Soviets are correct in interpreting Article 11 as "physical injury" and damage to tangible property, trade libel is, by definition, injury to tangible property. *See* R. Sack, *Libel, Slander and Related Problems* IX.8.1 (1980) ("[I]t is the plaintiff's interest in property, real or personal, *tangible* or intangible, that is protected"); Restatement (2d) of

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[6]In support of their theory, the Soviets and the U.S. government cite to the Special Rapporteur's comments — which were written over a decade after the *Convention* was signed and which have no force or effect of it whatsoever — that "tangible property" "does not cover cases where there is no physical damage. Damage to reputation or defamation is not personal injury in the physical sense . . ." *Report on the International Law Commission on the Work of Its 36th Session, U.N. General Assembly Official Records, 39th Sess., Supplement No. 10* (1984) at 157, *quoted in* U.S. Brief at 18. This truism is irrelevant, in any event, as the libel is covered by the "personal injury" clause of Article 11, not the "tangible property" clause.

Torts, sections 626, 623A (1977); *Shores v. Ships State Company*, 130 Cal. App. 2d 627, 630, 279 P.2d 595 (1955).

IV.

TRADE LIBEL AND LIBEL ARE DISTINCT CLAIMS

The Soviets curtly dismissed plaintiffs' trade libel argument (Gregorian Opening Brief at 25-28) as barred as a claim arising out of libel. [Soviet Brief at 46 (citing *Art Metal — U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C.Cir. 1985).] As explained in detail in plaintiffs' Opening Brief, *Art Metal* does not assert such an expansive claim. The court clearly limited its holding to include only those instances where the distinctions between "libel" and "trade libel" are irrelevant. 753 F.2d at 1156.

The Soviets also contend that plaintiffs have argued that "their libel claim could more properly be called by various terms." The Soviets mistake plaintiffs' position. Plaintiffs assert that the harm committed against them constituted *both* libel and trade libel. Indeed, in its October 7, 1985 findings, the court explicitly found that "plaintiffs' evidence . . . clearly shows that the defendants USSR, Izvestia, Ministry of Foreign Trade, V/O Medexport, and V/O Licensintorg published a libel damaging to plaintiff Ralph Gregorian *and* a *trade libel* damaging to California International Trade." [R.T., October 7, 1985, at 6 (emphasis added).]

The Soviets also completely misread amicus Washington Legal Foundation's analogy to emotional distress [Soviet Brief at 46.] Plaintiff does not, and never has, claimed that trade libel is a form of "intentional infliction of emotional distress." Such a nonsensical assertion shows a complete lack of understanding of the nature of

the distinction between libel and trade libel — libel or defamation is concerned with injury to the person, trade libel or disparagement is concerned with injury to property. *Matter of Kassler*, 611 F.2d 308, 311 (9th Cir. 1979); *Roemer v. Commissioner of Internal Revenue Service*, 716 F.2d 693, 699 (9th Cir. 1983); *Shores v. Ships State Company*, 130 Cal. App. 2d 627, 630, 279 P.2d 595, 597 (1955); *Erlich v. Etner*, 225 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256 (1964); Restatement (2d) of Torts sections 624, 626 (1977); *Prosser, Injurious Falsehood: The Basis of Liability*, 39 Colum. L. Rev. 425 (1959); *Prosser & Keeton, The Law of Torts* Section 128 (5th ed. 1985); *Acoustical Mfg. Co. v. Audio Times Inc.*, 3 Med. L. Ref. 2057 (D.C.Super. 1977).

V.

THE STATEMENT OF INTEREST OF THE UNITED STATES VIOLATES THE FSIA AND THE U.S. GOVERNMENT SHOULD NOT BE PERMITTED TO PARTICIPATE IN ORAL ARGUMENT.

There are two extremely significant points, *inter alia*, raised in the U.S. brief:

1. During the pre-briefing conference, Douglas Letter, Esq. represented that the United States would be filing a brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29. Instead a brief labelled "Statement of Interest of the United States" has been filed and, presumably, counsel for the United States will expect to participate in oral argument. Appellants join in the arguments and authorities advanced by amicus curiae State Department Watch Limited and strongly object to the involvement of the United States Government in this appeal.

The brief filed by the United States Government serves to prejudice the rights of American citizen Raphael Gregorian by urging this court to accept the position of the State Department in conscious disregard of the policies behind FSIA. In essence, the State Department is speaking out of both sides of its mouth: on the one hand they want this court to throw out Mr. Gregorian and CIT's judgment against the Soviets; on the other hand they claim they are not taking a position in this matter.

Appellants are constrained to request that this court not permit oral argument by the United States Government since to do so would permit them to occupy a position superior to other amicus curiae. Even though appellants object to the government's involvement in any capacity in this appeal, the prohibition on oral argument would at least be a step forward in limiting the State Department's political interfernce with private civil litigation under the FSIA.

2. The U.S. brief bluntly asks the Ninth Circuit to consider political factors when deciding the legal issues herein, and criticizes District Judge David Kenyon for refusing to do so:

> The district court should have given more sympathetic consideration to the Executive's view of the foreign affairs implications of this matter. [citation omitted]. Instead, the court apparently substituted its own judgment on this point.

(Statement of Interest of the United States at 47).

Appellants filed suit in an American court seeking justice due to the conduct of the Soviet defendants. Now, appellants are faced with arguments by their own government against them. Moreover, rather than reciting to principles of justice, the U.S. government is arguing

"politics", attempting to achieve the result it wants by citing "foreign affairs implications." The politicizing of this appeal only serves to further prejudice the rights of the plaintiffs.

CONCLUSION

For all the foregoing reasons, the April 5, 1987 Order of the United States District Court, Central District of California, setting aside the default judgment as to libel and dismissing the libel claim should be reversed.

DATED: May 20, 1988

Respectfully submitted,
KROLL & FIRESTONE

By: GERALD L. KROLL
Attorneys for Appellants
Raphael Gregorian and
California International
Trade Corporation

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 20, 1988, I served the within Appellants' Reply Brief in re: "Raphael Gregorian v. Izvestia" in the Court of Appeals for the Ninth Circuit, Nos. CA 88-5562 and CV 85-0100-KN;

On the Parties in said action, by placing Two copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Martin Popper
WOLF, POPPER, ROSS,
WOLF & JONES,
845 Third Avenue
New York, N.Y. 10022

Michael McDonald
Washington Legal
Foundation
1705 "N" Street N.W.
Washington, D.C. 20036

Douglas Letter
Civil Division
Appellate Staff, Rm. 3617
U.S. Department of Justice
10th Street and Pennsylvania
Avenue, Northwest
Washington, D.C. 20530

William Pearl
2721 Second Street, #210
Santa Monica, CA 90405

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on May 20, 1988, at Los Angeles, California.



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